No. 87-367-AFX
Status: GRANTED

Title: Bendix Autolite Corporation, Appellant
v.
Midwesco Enterprises, Inc.

Docketed:
September 1, 1987

Court: United States Court of Appeals
for the Sixth Circuit

See also:
87-170

Counsel for appellant: Crowley,Noel C.

Counsel for appellee: Britz,Harland M., Bornstein,Ira J.

NOTE* Notice of Appeal filed 8/26/87

Entry	Date	Note	Proceedings and Orders
1	Sep 1 1987	G	Statement as to jurisdiction filed.
2	Oct 2 1987		Motion of appellee Midwesco Enterprises, Inc. to affirm filed.
3	Oct 7 1987		DISTRIBUTED. October 30, 1987
4	Oct 7 1987		REDISTRIBUTED. October 30, 1987
5	Nov 2 1987		PROBABLE JURISDICTION NOTED.
			**********
6	Dec 19 1987		Joint appendix filed.
7	Dec 19 1987		Brief of appellant Bendix Autolite Corp. filed.
8	Dec 29 1987		Record filed.
		*	Certified copy of C. A. proceedings received.
10	Jan 5 1988		Order extending time to file brief of appellee on the merits until January 22, 1988.
11	Jan 5 1988		Record filed.
		*	Certified original record, 8 volumes, received.
12	Jan 22 1988		Brief of appellee Midwesco Enterprises, Inc. filed.
14	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 23, 1988. (4th case).
13	Feb 8 1988		CIRCULATED.
15	Mar 23 1988		ARGUED.

87-367

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BENDIX AUTOLITE CORPORATION,

Appellant,

—v.—

MIDWESCO ENTERPRISES, INC.,

Appellee.

INTERNATIONAL BOILER WORKS COMPANY,

Third Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED

1. Does the Ohio tolling statute (Ohio Rev. Code § 2305.15) impermissibly burden interstate commerce by denying foreign corporations the protection of the statute of limitations during such times as they cannot be served with process within the state?

2. Does the aforesaid tolling statute impermissibly burden commerce with respect to claims arising from contract, for which the tolling of the statute of limitations can be avoided by including in the contract itself a provision authorizing in-state service?

3. Should the decision invalidating the above statute have been given only prospective effect?

THE PARTIES

The plaintiff-appellant in this action is Bendix Autolite Corporation ("Bendix"), which as of March 29, 1985 was merged into The Bendix Corporation and ceased its separate existence. The Bendix Corporation was merged into Allied Corporation ("Allied") on April 1, 1985 and likewise ceased its separate existence.*

The defendant/third-party plaintiff-appellee is Midwesco Enterprises, Inc. The third-party defendant is International Boiler Works Company.

Anthony Celebrezze, Jr., the Attorney General of the State of Ohio, is being included as a respondent pursuant to the Rule 28.4(c) of the Rules of the Supreme Court of the United States.

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* Allied is a wholly-owned subsidiary of The Signal Companies, Inc., which in turn is a wholly-owned subsidiary of Allied-Signal Inc. The subsidiaries of Allied (other than wholly-owned subsidiaries) are Akebono Kohsan Co., Ltd. (Japan); Akebono S.A. (Japan); Allied Automotive Ltd. (Brazil); Allied-General Nuclear Services (Delaware); Bendix Electronic Service Corporation (Spain); Bendix France, S.A. (France); Bendix Group Superannuation Pty., Ltd. (Australia); Bendix Italia, S.p.A. (Italy); Bendix Mintex Proprietary Limited (Australia); Bendix-Jidosha Kiki Corporation (Delaware); Bunker Ramo Electronic Data Systems S.A. (Spain); France Automobile Service, S.A. (France); Garrett Comtronics Licensing Corp. (Texas); Identitech Corporation (Delaware); Iminor, S.A. (France); Industrial Turbines International Inc. (New Jersey); Ingold Electrodes, Inc. (Massachusetts); International Turbine Engine Corporation (Delaware); La Decoration Moderne, S.A. (France); Leaseway All-Services, Inc. (Delaware); Manbritt Industries, Inc. (New York); Mitsuwa Construction Co. (Japan); Nikki-Universal Co., Ltd. (Japan); Nippon Amorphous Metals Co., Ltd. (Japan); Nippon Brake Safety Institute (Japan); Oak Mitsui Inc. (New York); Propelentes Mexicanos, S.A. (Mexico); Sanzillon-Clichy, S.A. (France); Serind S.p.A. (Italy); Sifra Industrie, S.A. (France); Sistemas Bendix de Seguridad S.A. de C.V. (Mexico); Societe Civile Immobiliere Prieur & Cie (France); Societe Wheelabrator-Allevard S.A. (France); Sofratype, S.A. (France); Sonic Oil Separation, Ltd. (Canada); Tecpro Industrial Chemicals Ltd. (United Kingdom); Turbo Services SNC (France); UM Holding B.V. (Netherlands); UMMS Caribbean N.V. (Aruba); UMP Chemicals, S.A. (United Kingdom).

This is a proceeding wherein the constitutionality of a statute of the State of Ohio has been drawn in question. The lower courts did not, pursuant to 28 U.S.C. Section 2403(b), certify to the Attorney General of the State of Ohio the fact that the constitutionality of Ohio Revised Code Section 2305.15 was drawn in question.

Copies of this Jurisdictional Statement are also being served on counsel for all parties in the companion case of *Copley v. Heil-Quaker Corp.* One of the parties in that case (Heil-Quaker Corp.) appeared below as *amicus curiae* in this case.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit affirming the granting of summary judgment dismissing the complaint is reported at 820 F.2d 186 (1987). The Memorandum and Order of the Federal District Court for the Northern District of Ohio granting summary judgment is not reported. The opinion of the same District Court in the companion case of *Copley v. Heil-Quaker Corp.* is likewise not reported. Copies of the referenced opinions are included in the appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal from a decision by the United States Court of Appeals for the Sixth Circuit declaring a particular statute (the so-called Ohio tolling statute—Ohio Rev. Code § 2305.15) to be invalid under the Commerce Clause of the United States Constitution.

The statutory basis for jurisdiction is 28 U.S.C. § 1254(2), relating to decisions by a court of appeals holding a State statute to be invalid as repugnant to the United States Constitution.

The Court of Appeals rendered its decision affirming the District Court on June 3, 1987. Notice of appeal was filed on August 26, 1987 in the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

The decisions of the lower courts were based on Article I, Section 8 of the United States Constitution (the Commerce Clause) giving Congress the power

> ". . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes".

The State statute declared to have been unconstitutional is the Ohio tolling statute, Ohio Revised Code Section 2305.15, which reads as follows:

When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

STATEMENT OF THE CASE

Plaintiff-appellant Bendix in this action seeks to recover damages for breach of contract and fraud arising out of a written agreement under which defendant-appellee Midwesco sold and installed a coal-fired boiler system at Bendix' manufacturing facility in Fostoria, Ohio. This system was placed in service in July 1975 and the action was commenced in December of 1980.

Midwesco moved for summary judgment, claiming that Bendix' right of action was barred by the four-year statute of limitations fixed by Ohio Rev. Code § 1302.98 for contract actions, and by Ohio Rev. Code § 2305.09(c) for fraud actions. It was conceded that Midwesco was not authorized to do business in Ohio and had not appointed an agent for the service of process.

By decision and order dated April 27, 1983, the District Court denied Midwesco's motion insofar as it sought to interpret the tolling statute as not applicable because Midwesco was continually subject to the jurisdiction of the Ohio courts through long-arm service. The District Court's holding in that regard has never been appealed and is no longer in issue.

As part of the same decision, however, the court held in abeyance its decision on whether the tolling statute imposed an impermissible burden on commerce or was otherwise unconstitutional, noting that the same issue had also been raised in the case of *Copley v. Heil-Quaker Corp.*, which was then pending before it. The Court arranged for the oral argument of both cases in a single hearing.

Thereafter and on March 8, 1987, the District Court rendered decisions in both the present case and the companion (*Copley*) case, in each case dismissing the complaints on the ground that the Ohio tolling statute impermissibly burdened interstate commerce. In both cases appeals were taken to the Court of Appeals for the Sixth Circuit, which affirmed both decisions. The decision in the case of Bendix was rendered on June 3, 1987.

Plaintiff-appellant argued in both the District Court and the Court of Appeals that there was no impermissible burden on commerce, and specifically argued that Midwesco could have avoided the detrimental effect of the tolling statute either by including in its contract with Bendix a provision designating an agent on whom Bendix might serve process for claims related to that particular transaction, or by filing a designation with the Secretary of State, notwithstanding that it had not qualified to do business within the state.

THE QUESTIONS ARE SUBSTANTIAL

The "Commerce Clause" questions here presented for appellate review include all of the questions which this Court held it was procedurally prevented from answering in *G.D. Searle & Company v. Cohn*, 455 U.S. 404 (1982), and which necessitated a remand of that case for further proceedings. The most fundamental of these federal questions is also the very same question which Chief Justice (then Mr. Justice) Rehnquist, in his opinion dissenting from this Court's denial of certiorari in *Honda Motor Co. v. Coons*, 469 U.S. 1123 (1985), insisted this

Court should have reviewed on a purely discretionary basis. (That dissenting opinion by Chief Justice Rehnquist is hereinafter cited as the "Honda dissent".) At the same time, this case presents separate federal questions not presented in *Honda* which are shown to be substantial on the basis of *Searle*, thus making this case more substantial than *Honda*.[1]

This case, like *Searle* and *Honda*, involves a state statute which under certain circumstances tolls the running of the statute of limitations against foreign corporations and thus extends the period during which they are vulnerable to suit. *Searle* and *Honda* examined a particular New Jersey statute which specifically targeted foreign corporations and (as eventually interpreted by the New Jersey Supreme Court following this Court's remand in the *Searle* case) totally denied them the protection of the statute of limitations unless they first obtained a certificate of authority to do business in that state. (See Honda dissent, 469 U.S. at 1125—footnote.)

The analogous statute in this case (Ohio Rev. Code § 2305.15) serves essentially the same function as the New Jersey statute but does not single out corporations as such, and instead applies categorically to all parties who cannot be served within the state. The Ohio statute also differs from the New Jersey statute in that it has never been authoritatively interpreted as providing foreign corporations with only a single alternative to prolonged exposure to lawsuits, *i.e.*, the alternative of qualifying to do business within the state, which would thereupon subject them to the unlimited jurisdiction of that state, notwithstanding the possible absence of the minimum

1 In all proceedings in both of the lower courts, this case has been argued jointly with the previously referenced case of *Copley v. Heil-Quaker Corp. et al.*, Case Number 87-170. Although the identity of issues is not total, plaintiff-appellant will not object to the combination or consolidation of the two cases for such plenary consideration as may be granted. The present plaintiff-appellant hereby incorporates by reference all of the matters presented in the Jurisdictional Statement filed in that case.

contacts otherwise required under the Due Process Clause.[2] On the contrary, and as the remaining text will make clear, the court below has itself confirmed that where, as here, the parties have come together in a contractual relationship, there is at least one additional and less onerous means of avoiding the tolling statute.

In *Searle*, this court held that the New Jersey statute did not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment, even though it operated to the disadvantage of foreign corporations having no in-state representative legally authorized to accept service. The *Searle* majority ruled that although such corporations were subject to out-of-state service under the New Jersey long-arm statute, the tolling statute was nevertheless rationally related to legitimate governmental ends. One of the reasons given was that such corporations might be "potentially difficult to locate" even though there was no such problem with respect to the defendant in that particular lawsuit (455 U.S. at 410). Another reason was that the statutory preconditions for invoking the long-arm procedure made it more burdensome than conventional in-state service. (*Id.*).

With respect to the remaining question of whether the New Jersey statute impermissibly burdened interstate commerce—which was the dispositive issue in the present case in both of the lower court decisions—the *Searle* majority declined to resolve the point for two reasons. One was that the lower courts in that case had not decided the issue. The other reason was that it could not be determined from the record whether registering to do business was the only method by which foreign corporations could gain the benefit of the statute of limitations, or whether the appointment of an in-state representative could be otherwise accomplished "in some manner unexplained to us" (*Id.* at 414). The case was accordingly remanded to determine what New Jersey law actually required in that regard. (*Id.*).

2 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

During the same term and on March 8, 1982, this court also disposed of an appeal from a New Jersey state court in *Honda Motor Company, Ltd. v. Coons*, 455 U.S. 996 (1982), by vacating the judgment and remanding the case for further consideration in light of *Searle*. Proceedings after remand eventually led to a declaration by the New Jersey Supreme Court that foreign corporations cannot be represented in New Jersey for purposes of the tolling statute except by duly registering to do business, whereupon that court decided that the statute itself was unconstitutional as a burden on interstate commerce. *Coons v. American Honda Motor Co.*, 94 N.J. 307, 312-16, 463 A.2d 921, 924-25 (1983). It was that decision which Chief Justice Rehnquist insisted should have been reviewed by this Court. His reasons may be summarized as follows:

(1) The "Commerce Clause" precedents relied upon by the New Jersey Supreme Court in invalidating the statute involved dissimilar situations in which foreign corporations had been denied all access to state courts. American Honda, by way of contrast, was merely denied the benefit of the limitations defense. (Honda dissent, 469 U.S. at 1125.)

(2) According to the prior decisions of this Court, the protection of a statute of limitations has never been a "fundamental or natural right", and where it exists it is "provided only by legislative grace". Whether such protection is to be provided, therefore, involves only "a public policy decision about the privilege to litigate." (*Id.* at 1126.)

(3) The burden placed on interstate commerce is not insuperable because an affected corporation may nevertheless "plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself." (*Id.* at 1126.)

(4) The New Jersey decision "provided little discussion of why interstate commerce would actually be impeded" by withholding the limitations defense. For his part the Chief Justice observed, "The impact on interstate commerce here is fairly negligible." (*Id.* at 1126.)

(5) Under applicable precedent, a statute which "regulates even-handedly to effectuate a legitimate local public interest", and which has only an incidental effect on interstate commerce, "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*Id.* at 1126-27.)

The defendant-appellee in this case (Midwesco) maintains that under Ohio law, the tolling statute can be avoided only by registering to do business. Even assuming this is so, however, there at the very least remains for decision the exact same Commerce Clause question which this Court acknowledged was dispositive in *Searle*, and which Chief Justice Rehnquist thought was sufficiently substantial for the grant of certiorari in *Honda*.

It also seems clear, however, that the federal question here presented is not as limited as Midwesco would have it appear, and not as limited as the issue in *Honda*. Here an additional federal question arises from the fact that the lower courts essentially disregarded the teaching of *Searle* by failing to determine what means actually existed for complying with the Ohio tolling statute and by simply assuming, with no ruling from the Ohio courts and no independent factual analysis, that the effect of the tolling statute was forced licensure to do business.

Somewhat confoundingly, however, the Court of Appeals also conceded, in response to Bendix' argument, that if Midwesco had designated an agent for the service of process as part of its private contract with Bendix, that designation would have been effective. At that point, and in further disregard of the *Searle* precedent, the Court of Appeals dismissed the

availability of that procedure as unrelated to the Commerce Clause issue.[3] What the court should have acknowledged was that designation by private contract, since it need not have been a general designation operating for the benefit of other claims or other claimants, would not merely have reduced the burden on commerce, but rendered it nonexistent. There is no question, moreover, that under Ohio law, "if a foreign corporation has placed itself in such a position that it may be served with process [within the state], it may avail itself of the statute of limitations when sued." *Title Guaranty and Surety Co. v. McAllister*, 180 Ohio St. 537, 200 N.E. 831, 835 (1936).

The Court of Appeals also failed to effectively resolve what *Searle* identified as the controlling question, *i.e.*, whether compliance with the tolling statute could have been achieved simply by filing a notice with the Secretary of State. In sharp contrast to the situation in New Jersey as it existed at the time of *Searle*, where the record included a letter from the Secretary of State advising that New Jersey offered no procedure for designating an agent apart from the registration statute (*Id.*, 455 U.S. at 417—separate opinion of Powell, J.), the Ohio Secretary of State's office furnished a letter specifically declaring that it will "accept the proposed designation of agent without requiring the foreign corporation to obtain a license", after first determining by "thorough investigation" that the unlicensed corporation is "truly interstate in nature".[4]

The Court of Appeals, instead of demanding proof that licensure to do business was the only means of avoiding the tolling statute, treated the putative existence of an alternative filing procedure as a mere argument which Bendix had failed to prove. If in fact the Court of Appeals was unable to conclusively resolve the state law issue, as its opinion suggests was the case, it should have followed this Court's example in

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3 The relevant text of the decision reads in part: "While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause." (820 F.2d at 189.)

4 See Appendix, pp. 22a-23a.

Searle and protested that in the absence of definite knowledge as to what filing procedures were available and what burdens they entailed, the issue of whether there was an impermissible burden on commerce could not be decided.

There is also a substantial question as to the correctness of the Court of Appeals' refusal to consider whether the decision invalidating the tolling statute should have been applied only on a prospective basis. The basis for the refusal was that the issue had been raised only in Bendix' reply brief and not in its main brief.

CONCLUSION

Plenary consideration should be granted with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit
(Reported at 820 F.2d 186)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-3784

Decided and Filed June 3, 1987

BENDIX AUTOLITE CORPORATION,
Plaintiff-Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Defendant/Third-Party,
Plaintiff-Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before:

MARTIN, JONES, and MILBURN,
Circuit Judges.

BOYCE F. MARTIN, JR., *Circuit Judge*. Bendix Autolite Corporation appeals the grant of summary judgment to Midwesco Enterprises, Inc. in this diversity contract dispute. Bendix claims the district court erred in finding that Ohio's

tolling statute imposes an impermissible burden on interstate commerce. For the following reasons, we affirm.

Bendix is a Delaware corporation with its principal place of business in Ohio. Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, has no corporate office or facility in Ohio, and has not appointed an agent for service of process in Ohio.

Bendix and Midwesco entered into a contract in August 1974 whereby Midwesco would supply and install a coal-fired boiler system at a Bendix facility in Fostoria, Ohio. Bendix, dissatisfied with the system, filed suit in December 1980 claiming Midwesco improperly installed the boiler and knowingly installed a system that was too small to produce the quantity of steam specified in the contract.

Midwesco moved for summary judgment arguing that Bendix's action was barred by Ohio's statute of limitations. Ohio allows four years for bringing claims for breach of contract for the sale of goods and four years for claims for fraud. Ohio Rev. Code §§ 1302.98, 2305.09(c).

Midwesco raised two arguments in its motion, both concerning the applicability of Ohio's saving clause which reads:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Id. § 2305.15.

First, Midwesco contended that the statute was inapplicable because Midwesco was, in effect, present in Ohio during the relevant period. Midwesco claimed that because it was contin-

tually subject to the long arm jurisdiction of the Ohio courts, it should be considered within the state for purposes of the statute. Second, Midwesco argued that the statute was inapplicable because it imposed an impermissible burden on interstate commerce in violation of the Constitution. The district court rejected Midwesco's first argument but granted summary judgment on the ground that the tolling statute is unconstitutional.

A court may determine whether a state statute violates the commerce clause by employing either a balancing test or a *per se* rule. The balancing approach is appropriate in instances where there is no patent discrimination against interstate trade and where other legislative objectives are credibly advanced. As the Supreme Court explained in *Philadelphia v. New Jersey*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

437 U.S. 617, 624 (1978) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In other instances, the burden on interstate commerce is deemed so direct and substantial that the Court has said it is unnecessary to balance the competing interests and has ruled state statutes to be *per se* violations of the commerce clause. *See South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938). The *per se* rule is commonly applied when state regulations discriminate against foreign corporations engaged exclusively in interstate commerce merely because they have failed to qualify to do business in the state. *See Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974);

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

The district court relied on two recent cases in deciding that Ohio's statute is unconstitutional. In *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983), the New Jersey Supreme Court reviewed a tolling statute similar to Ohio's.[1] The court first determined that in order to be "represented" in New Jersey within the meaning of the statute, a corporation had to be licensed to do business in the state. The court then held the statute to be a *per se* violation of the commerce clause, stating that:

> [t]he legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

463 A.2d at 927.

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1 N.J. Stat. § 2A:14-22 (1984) reads in pertinent part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as a part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times or nonresidence or nonrepresentation.

In *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D. Idaho 1983), the court dealt with a tolling statute that required corporations to meet certain provisions prior to receiving the benefits of the statute of limitations.[2] These provisions demanded that corporations record articles of incorporation with the Secretary of State prior to doing business in Idaho and that foreign corporations designate a person within the state for service of process. Idaho Code 30-501, 30-502 (repealed 1979).

The court, using a balancing test, found the statute to be unconstitutional. *McKinley*, 575 F.Supp. at 947-48. It declined to use a *per se* analysis because under Idaho case law interpreting Idaho legislative intent, the statute could not be construed as applying only to firms engaged exclusively in interstate commerce. *Id.* at 945. The court noted, however, that the statute would have also clearly violated the commerce clause if the *per se* rule had been applied.

We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand. The Ohio tolling statute, like those of New Jersey and Idaho,

> places the foreign corporation in the . . . difficult position of having to choose between exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the state].

McKinley, 575 F.Supp. at 945. We find this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause.

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2 Idaho Code 30-509 (repealed 1979) read:

> Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

Bendix argues that we need not find the statute unconstitutionally burdensome because foreign corporations may, in fact, appoint an agent to receive process in Ohio without formally registering to do business in the state. It offers two methods for accomplishing this: 1) designating an agent by contract, and 2) giving notice to the Secretary of State. We find neither of these arguments persuasive. While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause. With regard to Bendix's suggestion that a corporation may merely notify the Secretary of State of its designated representative, we note simply that this argument is highly speculative and devoid of any statutory support.

Next, Bendix contends that the district court erred by unnecessarily deciding the constitutional issue. We disagree. Bendix had initially claimed that because Midwesco promised but failed to repair the boiler system over a four year period Midwesco should be estopped from asserting the statute of limitations defense. The district court rejected this argument because Bendix failed to produce affidavits in support of its allegations. Therefore, we find that because the district court first considered the state law issue, it did not err in deciding the constitutional question.

Finally, Bendix argues that in the event the destrict court is affirmed on the constitutional issue, the ruling should be given only prospective effect. Bendix raises this claim for the first time in its reply brief and, consequently, we refuse to consider it now. *Thompson v. C.I.R.*, 631 F.2d 642 (9th Cir. 1980). "The general rule is that appellants cannot raise a new issue for the first time in their reply briefs." *Id.* at 649.

The decision of the district court is affirmed.

Memorandum and Order of the United States District Court for the Northern District of Ohio, Western Division
(Filed March 8, 1984)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 80-750

BENDIX AUTOLITE CORPORATION,

Plaintiff

vs.

MIDWESCO ENTERPRISES, INC., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto, defendants' reply and plaintiff's supplemental response. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint

seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

This Court in a memorandum and order filed April 27, 1983 denied that portion of defendant Midwesco's motion for summary judgment which argued that plaintiff's action was time barred under the statute of limitations. This Court reserved the issue of whether the Ohio Tolling Statute, O.R.C. § 2305.15, imposed an impermissible burden on interstate commerce and whether O.R.C. § 2305.15 violated the due process clause of the Fourteenth Amendment Because this Court was to hear oral argument on these same issues in the case of Copley v. Heil-Quaker, No. C 82-512, the Court permitted the parties to participate in that hearing. The issues herein are presented on the pleadings, memoranda, affidavits and oral arguments.

Defendant Midwesco has argued that the provisions of O.R.C. § 2305.15 violate the Commerce Clause under either a *per se* or a balancing test. Defendant Midwesco also has argued that O.R.C. § 2305.15 violates the due process clause of the Fourteenth Amendment because a state cannot regulate foreign corporations doing business within the state's borders by imposing conditions on the corporation which require relinquishment of constitutional rights.

The Court will first consider defendant Midwesco's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the

benefit to the state of the statute. *Pike v. Brice Church, Inc.*, *supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc.*, *supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According

to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn*, *supra*, remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate

the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., supra at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Midwesco, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Midwesco, because they violate the Commerce Clause.

Having found that the provisions of O.R.C. § 2305.15 violate the Commerce Clause, the Court does not reach defendant Midwesco's due process arguments.

Finally, plaintiff has argued that defendant Midwesco should be estopped from asserting a statute of limitations defense because defendant Midwesco promised over a four year period to repair defects in the boiler system and failed to do so. Plaintiff alleges that it reasonably relied upon defendant Midwesco's representations in forebearing to institute this lawsuit. Plaintiff also argues that under Ohio law the statute of limitations on fraud does not begin to run until the fraud is discovered. According to plaintiff, it first learned of defendant Midwesco's fraud in knowingly installing a boiler system which did not meet specifications on August 24, 1979. Therefore, plaintiff argues that its action filed December 19, 1980 was filed well within the four year statute of limitations for fraud.

As defendant points out, plaintiff has failed to support these arguments with any affidavits which establish that genuine issues of material fact exist on either the issue of estoppel or fraud. Therefore, the Court finds that no genuine issue on either of these arguments exists for trial. See Fed.R.Civ.P. 56(e).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant Midwesco's motion for summary judgment be, and hereby is, DENIED in part and GRANTED in part; and it is

FURTHER ORDERED that plaintiff's claims against defendant Midwesco be, and hereby are, dismissed; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on defendant Midwesco's third party claims on March 19, 1984 at 11:30 A.M.

/s/ JOHN W. POTTER
United States District Judge

Memorandum and Order of the United States District Court for the Northern District of Ohio, Western Division, in the companion case of *Copley v. Heil-Quaker Corp.*
(Filed March 8, 1984)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 82-512

WILLIAM COPLEY, et al.,

Plaintiffs

vs.

HEIL-QUAKER CORP., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., No. C 83-682. This case was transferred to this Court from the District of Minnesota,

Fourth Division, pursuant to the provisions of 28 U.S.C. § 1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues herein were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that on December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are conducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio. Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the consortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. § 2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. § 2305.16 provides that, as to him, the two-year period of limitations would commence to run when his minority terminated. Thus his time to assert his claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. § 3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. § 2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed. . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long-arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that § 2305.15, as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that § 2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to do business pursuant to O.R.C. § 1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contact required for suit in Ohio. Under the Due Process Clause and the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310, (1945), Heil-Quaker further argues that § 2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically § 1703.02 and § 2305.15, constitute a trap for unwary sellers.

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1 The argument that the provisions of O.R.C. § 2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

Heil-Quaker also asserts that § 2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their businesses. Finally, Heil-Quaker argues that § 2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc.*, *supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc.*, *supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such

as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn*, *supra*, remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.* — Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's. Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. § 111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.* 14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant part as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons*, *supra*, at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. § 111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mill, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged

in interstate commerce might surmise that the Secretary of State after thorough investigation might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricia Mill, dated September 14, 1983, in which Ms. Mill indicated as follows:

> Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. § 2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. § 2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in Minnesota. That court dismissed plaintiffs' claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. § 2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. § 2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. § 2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. § 2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St.3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plaintiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of the CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. § 2072. Plaintiffs, in

the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dismiss and ordered the case transferred to this Court pursuant to the provisions of 28 U.S.C. § 1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. § 2305.10 and that any tolling provisions set forth in O.R.C. § 2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ JOHN W. POTTER
United States District Judge

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 85-3784

BENDIX AUTOLITE CORPORATION,
Plaintiff-Appellant,

v.

MIDWESCO ENTERPRISES, INC.
Defendant/Third-Party Plaintiff-Appellee.

INTERNATIONAL BOILER WORKS COMPANY,
Third Party Defendant.

PLEASE TAKE NOTICE that Bendix Autolite Corporation, the the above-named plaintiff-appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit dismissing the complaint entered in this action on June 3, 1987. Specificially, the appeal is taken from the final judgment of the United States Court of Appeals for the Sixth Circuit declaring the Ohio Savings Clause, Ohio Revised Code Section 2305.15, to be in violation of the Commerce Clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

/s/ NOEL C. CROWLEY

Noel C. Crowley
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New York, New York 10153
Tel. (212) 750-9301
Attorney for Plaintiff-Appellant

Dated: August 26, 1987

No. 87-367

In The
Supreme Court of the United States
October Term, 1987

—o—

BENDIX AUTOLITE CORPORATION,
Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, by denying the benefit of the statute of limitations to corporations which are not licensed to do business in Ohio, the Ohio tolling statute, Ohio Rev. Code § 2305.15, violates the Commerce Clause as applied to Midwesco Enterprises, Inc.

2. Whether the fact that the parties to the contract could have included a provision naming an agent to receive process, which in fact was not done, can avoid the Ohio tolling statute's unconstitutional burden on interstate commerce.

3. Whether the Court of Appeals acted correctly in refusing to entertain the argument, which was raised for the first time before it in the reply brief and which had never been raised in the District Court, that the ruling that the Ohio tolling statute was unconstitutional should have been given only prospective effect.

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No. 87-367

In The
Supreme Court of the United States
October Term, 1987

BENDIX AUTOLITE CORPORATION,
Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

Appellee, MIDWESCO ENTERPRISES, INC. ("Midwesco"), hereby moves to affirm the granting of summary judgment to Midwesco on the ground that the questions upon which the decision depends are so unsubstantial as to not require further argument.

COUNTERSTATEMENT OF THE CASE

Appellant filed its action against Midwesco on December 19, 1980 in the United States District Court for the Northern District of Ohio. It sought to recover damages arising out of the sale and installation of a coal-fired boiler system. Appellant began beneficial use of the boiler system on July 3, 1975.

Midwesco moved for summary judgment on the ground that appellant's action was barred by Ohio's statute of limitations. The applicable Ohio statute of limitations require that both contract claims and fraud claims be brought within four years. Ohio Rev. Code §§ 1302.98, 2305.09(*c*). Midwesco first contended that Ohio's tolling statute, Ohio Rev. Code § 2305.15, was inapplicable inasmuch as Midwesco was continually subject to the long arm jurisdiction of the Ohio courts. Midwesco further contended that the tolling statute was unconstitutional as violating both the Commerce Clause of the Constitution and the Fourteenth Amendment thereto.

The District Court's decision issued on April 27, 1983 held that Midwesco was subject to the tolling statute based upon a finding that Midwesco was "out of state" for purposes of the tolling statute. In its decision, the District Court held in abeyance Midwesco's arguments that the tolling statute was unconstitutional and granted the parties the right to seek leave of court to participate in oral arguments in *Copley v. Heil-Quaker Corp.*, No. C 82-512. *Copley*, which also raised the question of the constitutionality of the tolling statute, had been filed in the same district court and was pending at the time before the same judge.

Appellant conceded that Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, maintained no corporate office or facility in Ohio and did not appoint an agent for service of process in Ohio.

On March 8, 1984, the District Court issued its decision in which it found that under Ohio law the only way that a foreign corporation such as Midwesco can appoint an agent for service of process within Ohio and thereby satisfy the tolling statute is by obtaining a license to do business in Ohio. The court thus held that the tolling statute violates the Commerce Clause and never reached Midwesco's additional argument that the tolling statute violates the Due Process Clause.

The District Court analyzed the tolling statute under both a *per se* test and a balancing test and held, under both standards, that it violates the Commerce Clause as applied to Midwesco. The court therefore granted Midwesco's motion for summary judgment inasmuch as the action was barred by the statute of limitations. Appellant never raised in the District Court the question of a contractual provision appointing an agent for service of process avoiding the effects of the tolling statute. Appellant also never raised in the District Court the question of the prospective application of the decision and the same was never considered by the court.

Appellant appealed the decision to the Court of Appeals which, in a decision reported at 820 F.2d 186, affirmed the District Court's decision granting Midwesco's motion for summary judgment. In so doing, the Court of Appeals agreed with the District Court and held that in

order for a foreign corporation to satisfy the tolling statute it must obtain a license to do business in Ohio requiring the appointment of an agent for service of process exposing the corporation to personal jurisdiction in the state courts. The Court of Appeals found this burden placed on foreign corporations engaged in interstate commerce to be a *per se* violation of the Commerce Clause. The Court of Appeals considered, and found unpersuasive, Bendix's contention that the Court need not find the tolling statute unconstitutionally burdensome because foreign corporations can appoint an agent to receive process in Ohio without formally registering to do business in the state. Finally, the Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the District Court's ruling should be given only prospective effect.

———o———

ARGUMENT

Appellant, as it has done throughout this litigation, relies upon *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), involving a statutory scheme nearly identical to that of Ohio. This Court reviewed and upheld the New Jersey tolling statute under the Equal Protection Clause of the Constitution. As to the question of the statute's validity under the Commerce Clause, this Court remanded the case because neither the District Court nor the Court of Appeals had directly addressed the issue and in order to determine whether, under New Jersey law, a foreign corporation could avoid the tolling statute without having

to become licensed to do business in the state. This latter question arose only because of what the Court perceived as an ambiguity in a footnote in the New Jersey Supreme Court's decision in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). It was not, as appellant contends, due to confusion in the record.

Ironically, *Coons v. American Honda Motor Co.*, 94 N.J. 307, 462 A.2d 921 (1983), which is relied upon by both the Court of Appeals and the District Court in the present cause, is the culmination of this Court's remand in *Searle*. (*Id.* at 923) The New Jersey statutes which were at issue in *Coons* are practically identical to their Ohio counterparts at issue in the present cause: N.J.S.A. 2A:14-22 and Ohio Rev. Code § 2305.15, N.J.S.A. 14A:4-1 and Ohio Rev. Code § 1703.041 and New Jersey Rule 4:4-4(c)(1) and Ohio Civil Rule 4.2(6). Justice Powell, in his opinion in *Searle* concurring in part and dissenting in part, reviewed New Jersey law and determined "that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." (455 U.S. at 419) Justice Powell's position was confirmed by the New Jersey Supreme Court in *Coons* which, after reviewing New Jersey's statutory scheme, held that a foreign corporation can gain the benefit of the statute of limitations *only* by receiving a certificate of authority to do business in New Jersey.

The *Coons* court then proceeded to review New Jersey's tolling statute in the light of well-established constitutional precedent. Among other cases, *Coons* cited this Court's decisions in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co. v. Bondurant*,

257 U.S. 282 (1921); and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), holding that a state cannot require foreign corporations engaged in interstate commerce to become licensed as a condition to obtaining access to the courts of the state. The *Coons* court (463 A.2d at 927) recognized that there is no fundamental right to a statute of limitations defense but proceeded to hold:

> That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

The Supreme Court of New Jersey thus held that the tolling statute was a forced licensure provision which must be stricken as a *per se* violation of the Commerce Clause.[1]

This Court denied certiorari from the decision of the New Jersey Supreme Court in *Coons. Honda Motor Company, Ltd. v. Coons*, 469 U.S. 1123 (1985). The reasons cited by appellant for plenary consideration, which are lifted from Chief Justice Rehnquist's dissent from the denial of certiorari in *Coons*, are no more compelling now than they were then. Since the decision in the present matter is consistent with the decision in *Coons* there is no reason for this Court to give any further consideration to this matter. The Sixth Circuit approvingly cited *Coons*

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[1] The Court also found that the New Jersey tolling statute would violate the Commerce Clause under a balancing analysis. (463 A.2d at 926, n. 7)

as well as the aforementioned Supreme Court decisions in holding that the burden placed on foreign corporations such as Midwesco constitutes a *per se* violation of the Commerce Clause. Furthermore, there is a striking lack of authority in appellant's jurisdictional statement for any of its contentions.

The Sixth Circuit found that the tolling statute forces a foreign corporation to choose between exposing itself to personal jurisdiction in Ohio's state courts by complying with the statute or remaining liable in perpetuity for all lawsuits containing state causes of action. (820 F.2d at 188) The reason for this is that the courts of Ohio are courts of general jurisdiction and personal service upon the Ohio agent would give the court jurisdiction over all transitory causes of action. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393 (1931); *Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 Ohio App. 116, 197 N.E.2d 379 (1963). Therefore, just as the *Coons* court recognized, this is not a question of the statute of limitations being found to be a fundamental right even though the specter of this is raised by appellant's paraphrasing the dissent from the denial of certiorari in *Honda*.

Appellant inaccurately characterizes the teaching of *Searle* as being the necessity of determining what means existed for complying with the Ohio tolling statute. That was neither the teaching nor the controlling issue in *Searle* but rather was raised merely because of what was perceived as being an ambiguity in New Jersey law arising out of a footnote in the *Velmohos* decision. Appellant also

incorrectly states that the lower courts herein failed to determine what means existed for complying with the Ohio tolling statute. The District Court, in reaching its decision, specifically found that, upon review of the Ohio statutory scheme, the only way for a foreign corporation to obtain the benefits of the statute of limitations was to become licensed to do business in the State of Ohio. This was the same conclusion reached by the court in *Coons*. The District Court's holding was affirmed by the Sixth Circuit.

This Court in *Searle* did not, as appellant contends, identify the controlling question to be whether compliance with the tolling statute could be achieved simply by filing a notice with the Secretary of State. In fact, no such statement is to be found anywhere in the *Searle* opinion. The relevant rule regarding service upon a corporation in Ohio is Ohio Civil Rule 4.2(6) which is identical to New Jersey Rule 4:4-4(c)(1) which was at issue in *Coons*. Upon review of New Jersey's statutory scheme, the New Jersey Supreme Court in *Coons* held that the benefit of the tolling statute could not be achieved simply by filing a notice with the Secretary of State. (463 A.2d at 924-925) *Coons* was approvingly cited by both the District Court and the Court of Appeals in this cause.

In an unsuccessful attempt at distinguishing New Jersey law, appellant contends that at the time of *Searle* the record included a letter from the Secretary of State advising that New Jersey offered no procedure for designating an agent apart from the registration statute. Appellant, however, fails to point out that the court in *Coons*, in referring to the opinion of the New Jersey Secretary

of State, stated that since *Searle* the Secretary of State "has acceded to the Attorney General's contrary position that in accordance with N.J.S.A. 14A:1-6(4) and N.J.S.A. 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of process." (463 A.2d at 925) Despite the fact that both the Secretary of State and the Attorney General took positions to the contrary, the New Jersey Supreme Court held that a foreign corporation could designate an agent for service of process only by registering to do business in the state.

In attempting to contrast the law of New Jersey with that of Ohio, appellant contends that, unlike New Jersey, the Ohio Secretary of State's office furnished a letter regarding its acceptance of a proposed designation of agent without requiring a foreign corporation to obtain a license. It must first be pointed out that said letter was never filed in this cause but rather is part of the record in the *Heil-Quaker* case. More importantly, the District Court in *Heil-Quaker* carefully considered this argument and totally rejected the same while pointing out that during the course of the litigation the Secretary of State's opinion had changed—that the Ohio Secretary of State in a letter had stated that it may accept for filing a designation of statutory agent *only* for those foreign corporations duly licensed to transact business in Ohio. (Appellant's Appendix pp. 22A-24A)

The Court of Appeals, in considering the same argument, stated that Bendix's suggestion was "highly speculative and devoid of any statutory support." (820 F.2d at 189) There is no indication at all in the Sixth Circuit's

opinion that it was unable to resolve the state law issue as appellant contends. Rather, the Sixth Circuit held that Ohio's statutory scheme provided no support for appellant's argument.

Bendix next raises the argument, rejected by the Court of Appeals, that Midwesco *could have* designated an agent by contract. The Court of Appeals did not concede that *if* Midwesco had designated an agent that designation would have been effective. The Sixth Circuit merely acknowledged that Midwesco could have chosen to name an agent as part of its contract but went on to hold that "this fact alone in no way solves the problem of whether the tolling statute violates the Commerce Clause." (820 F.2d at 189) Midwesco in fact did *not* name an agent in its contract with appellant. Appellant thus raises a red herring in attempting to divert the Court's attention from the question of the tolling statute's violation of the Commerce Clause. Moreover, this same question was raised before the court in *Coons* and rejected by it. (463 A.2d at 923-924) In fact, appellant's argument simply parrots the dissent in *Coons*. (463 A.2d at 929-930) Justice Powell, in his opinion concurring in part and dissenting in part in *Searle*, similarly reviewed the issue within the context of the statutory scheme. As the Sixth Circuit in the instant cause agreed, the question of the designation of an agent must be viewed within the statutory scheme. Under the statutory scheme, a foreign corporation can designate an agent only by becoming licensed to transact business in Ohio. Ohio Rev. Code § 1703.041. Otherwise, a foreign corporation could easily circumvent the statutory scheme. The holding of the Sixth Circuit is in no way

contrary to the *Searle* decision, as appellant argues without any support.

Additionally, Midwesco could not have been forced to designate an agent in its contract with appellant. This would simply permit appellant to achieve indirectly that which has been declared unconstitutional under the tolling statute. Midwesco cannot be forced to waive the requirement that the Ohio courts have personal jurisdiction over it.

Without any support at all, appellant merely makes the naked statement that there is a substantial question as to the correctness of the Court of Appeals' refusal to consider whether the District Court's decision should have been applied only prospectively. Appellant cites no support for its position simply because there is none. Appellant first raised the issue in this litigation in its reply brief before the Sixth Circuit. For that reason, based upon a long established rule, the Court of Appeals refused to consider the issue. (820 F.2d at 189)

Not only was this issue raised for the first time on appeal in appellant's reply brief—it was never even raised before the District Court. As such, the District Court could not have ac d improperly in applying its decision to the case at hand. Furthermore, the decision holding that the tolling statute is an unconstitutional violation of the Commerce Clause was issued by the District Court in this very case. The District Court's holding must be applied in this case to avoid the bar against constitutional adjudications standing as mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Valdez v. Perini*, 474 F.2d 19, 21 (6th Cir. 1973).

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CONCLUSION

The lower courts in this case simply applied well-established legal precedent. Appellant has failed to cite any authority for its contentions and has failed to establish that the issues are so substantial as to require plenary consideration. The granting of Midwesco's motion for summary judgment on the ground that this action is barred by the statute of limitations is correct, poses no question requiring further briefing and oral argument before this Court and should be affirmed.

Respectfully submitted,

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No. 87-367

In The

Supreme Court of the United States

October Term, 1987

BENDIX AUTOLITE CORPORATION,

Appellant,

v.

MIDWESCO ENTERPRISES, INC.,

Appellee.

INTERNATIONAL BOILER WORKS COMPANY,

Third Party Defendant.

APPEAL FROM THE UNTED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement Filed September 1, 1987
Probable Jurisdiction Noted November 2, 1987

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RELEVANT DOCKET ENTRIES

DATE	N.R.	PROCEEDINGS
12-19-80	1	COMPLAINT with Jury Demand, fld.
12-19-80		SUMMONS issued.
1- 8-81		SUMMONS returned SERVED 12-30-80 on Midwesco Enterprises, Inc., filed. Marshal fees $3.00.
1-15-81		STIP. and ORDERED that deft. has to Feb. 20, 1981 to respond, filed. DJY Notice waived.
1-19-81		APPEARANCE of Philip L. Dombey as counsel for pltf., filed. Copies mailed 1-15-81.
1-19-81		MOTION of Dombey, Atty. for leave to participate in a particular Case, filed. Attached affidavit. Copies mailed 1-15-81.
2- 6-81		APPROVED MOTION of Attorney Dombey granting permission for Gerald K. Flagg to participate as co-counsel for plaintiff, filed. DJY. Copies mailed to Dombey, Flagg, and Bamman.
2-20-81	2	ANSWER of deft. Midwesco to complaint, filed. Copies mailed (2-23-81)
2-27-81	3	3rd party complaint against *International Boiler Works Co.*, filed. Copies mailed. (2-27-81)
2-27-81	4	3rd party complaint against *Stoker Corp.; Joseph F. Stenglein; Robert L. Dubs* and *Unknown Stockholders and Officers of Stoker Corp.*, filed. Copies mailed. (2-27-81)
2-27-81		3rd party Summons issued to U.S. Marshal Office. (2-27-81)
2-27-81	5	INTERROGATORIES of 3rd party pltf. to deft. Thomas E. Barnes, filed. Copies mailed. (2-27-81)

DATE	N.R.	PROCEEDINGS
2-27-81	6	INTERROGATORIES of 3rd party pltf. to deft. Joseph E. Stenglein, filed. Copies mailed. (2-27-81)
2-27-81	7	INTERROGATORIES of 3rd party pltf. to deft. Robert L. Dubs, filed. Copies mailed. (2-27-81)
3- 6-81		2 SUMMONS returned and filed. 3rd Party Complaint SERVED: 3-3-81 on Joseph F. Stenglein and 3-4-81 on Robert L. Dubs.
3- 9-81	3	Summons returned and filed. 3rd Party Complaint SERVED: 3-4-81 on The International Boiler Works Company and 3-5-81 on Stoker Corporation C/O Statutory Agent Glenn T. Dubs, and Unknown Stockholders and Officers of Stoker Corp. c/o Glenn Dubs Statutory Agent.
3-16-81	8	NOTICE of pltf. of taking records depo. and Request for Production of Documents under FR 34, filed. Copies mailed 3-13-81.
3-16-81	9	1st set of interrogatories of pltfs. to deft., filed. Copies mailed 3-13-81.
3-20-81		MOTION of 3rd party defts. for enlargement of time (to April 20, 1981) to respond to complaint and interrogatories, filed. Copies mailed 3-18-81.
4- 6-81		ORDERED that 3rd party defts. have thru April 20, 1981 to file response to 3rd party complaint and to Interrogatories, filed. DJY Copies mailed 4-7-81.
4-17-81		STIP. & ORDER granting deft. Midwesco to May 18, 1981 to file its answers to interrogatories, fld. DJY. Notice waived.
4-22-81	10	ANSWER of 3rd Party Defts, to Complaint of Third Party Pltf., filed. Copies mailed 4-20-81.

DATE	N.R.	PROCEEDINGS
5- 6-81	11	MOTION of deft. and 3rd Party Pltf., Midwesco, *for default judgment* against 3rd Party Deft., International Boiler Works Company, filed. Copies mailed. Denied 8-1-82.
5-11-81		DEFAULT NOTED BY CLERK against 3rd party deft. International Boiler Works Company, filed. Copies mailed to all counsel of record. (On Motion)
5-18-81	12	ANSWERS of deft. Barnes to interrogatories of deft. Midwesco, filed.
5-18-81	13	ANSWERS of deft. Stenglein to interrogatories of deft. Midwesco, filed.
5-18-81	14	ANSWERS of deft. Dubs to interrogatories of deft. Midwesco, filed.
5-29-81		Stip. and ordered that deft. Midwesco has to June 20, 1981 to respond to interrogatories, filed. DJY Copies mailed to Domby and Bamman. (5-29-81)
5-29-81		JUDGMENT ENTRY that co-counsel for deft. is authorized to withdraw as counsel, filed. DJY Copies mailed 6-1-81.
6- 1-81		MOTION of H. William Bamman, attorney for deft. Midwesco, for leave to participate, filed. Mld.
6-18-81		Approved motion of deft. Midwesco for leave to participate, filed. DJY Copies mailed 6-22-81. Barnet and Beigel may appear as co-counsel on behalf of deft. Midwesco.
7-20-81	15	MOTION of pltf. to compel discovery, filed, with Affidavit in support of reasonable attorney fees, filed. Copies mld. 7/17/81. Denied.
7-29-81		MOTION of deft. to strike, filed. Copies mailed. Granted.

DATE	N.R.	PROCEEDINGS
8-11-81	16	OPPOSITION of pltf. to deft's motion to strike, filed. Copies mld. 8/10/81.
8-10-81	17	ANSWERS of deft. to Interrogatories, filed. Copies mailed 8/10/81.
8-26-81	18	RESPONSE of deft. to pltf's Request for Production of Documents, filed. Copies mailed 8-24-81.
9-17-81	19	MOTION (2nd) of pltf. for order compelling discovery, filed. Copies mailed.
9-25-81		MOTION of deft. Midwesco for extension of time to October 21, 1981 to respond to Motion to Compel, filed. Copies mailed.
10-13-81		Ordered that deft. Midwesco has to Oct. 21, 1981 to file its response to pltfs. 2nd motion for Order Compelling Discovery, filed. DJY Copies mailed. (10-13-81)
10-21-81	20	INTERROGATORIES (1st) of deft. to pltf., filed.
10-21-81	21	RESPONSE of deft. Midwesco to pltfs. 2nd motion for order compelling discovery, filed. Copies mailed 10-21-81.
10-29-81	22	MOTION of pltf. for ext. of time to answer, object, or otherwise respond to deft's Interrogatories, filed. Copies mailed 10-28-81.
11-16-81	23	RESPONSE of deft. to pltf's. motion for an order expanding the period in which to answer, object, or otherwise respond to deft's. interrogatories, filed. Copies mailed 11-12-81.
12- 7-81	24	MOTION of 3rd party pltf. Midwesco for default judgment against 3rd party deft. International Boiler Works, filed. Copies mailed 12-4-81.

DATE	N.R.	PROCEEDINGS
1- 5-82	25	MEMO. of 3rd party deft. Intl. Boilerworks Co. in opposition to motion of 3rd party pltf. Midwesco for default judgment, fld. Mld.
1-26-82	26	ANSWER of the International Boiler Works Company to Third Party Complaint Lodged. Copies mailed 1-26-82.
6-21-82	27	REQUEST of deft. and 3rd party pltf. for production of documents from International Boiler Works Company, filed. Copies mld. 6/18/82.
6-21-82	28	REQUEST of deft. and 3rd party pltf. for production of documents from Canton Stoker Corporation, filed. Copies mld. 6/18/82.
8-30-82		MOTION for leave to file amended 3rd party complaint filed. Mld.
9- 1-82	29	MEMO. & ORDER filed. JWP. Pltf's. motions to compel denied. Deft's. motion to strike is granted. Motion of 3rd party pltf. for default judgment against 3rd party deft. International Boiler Works Co. denied. Copies 77(d) to: Domby, Flagg, Bamman, Simiele, and Britz. (9/1/82)
9-16-82		ORDER (endorsed on motion) granting 3rd-pty. pltf. leave to file amended 3rd-pty complaint filed. JGC for JWP. Copies 77(d) to: Domby, Flagg, Bamman, Simiele and Britz. (9/16/82)
9-16-82	30	AMENDED THIRD PARTY COMPLAINT filed. Mld. (not served by summons on new 3rd-pty defts).
9-24-82		NOTICE, Pretrial 10-6-82 at 11:00 A.M. Mailed to Dombey, Flagg & Bamman.

DATE	N.R.	PROCEEDINGS
10- 6-82	31	Deft. Midwesco SUPPLEMENTAL ANSWERS to interrogatories filed. Mld.
10-15-82		NOTICE, pretrial 10/21/82 at 11:30 a.m. mld. to: Dombey, Flagg and Banman.
10-20-82		MOTION of deft. Midwesco for continuance of pretrial filed. Mld.
10-22-82	32	PLTF'S ANSWERS to interrogatories filed. Mld.
10-22-82		ORDER granting deft. Midwesco's continuance of pretrial 10/21/82 filed. Pretrial reset for 11/8/82 at 2:30 p.m. JWP. Copies mld. (10/25/82)
10-22-82		MOTION & ORDER granting pltf's continuance of pretrial 10/21/82 filed. JWP. Copies mld. (10/25/82)
11- 3-82		SUMMONS issued on amended 3rd-pty. complaint.
11- 8-82		MOTION for continuance by pltf. filed. Mld.
11- 8-82	33	ORDER (endorsed on motion) denying pltf's motion for continuance of pretrial 11/8/82 filed. JWP. Copies mld. (11/8/82)
11- 8-82	34	MOTION of deft. Midwesco for summary judgment filed. Mld.
11-15-82		10 SUMMONS ret. & filed. 1 served 11/4; 6 served 11/5; 2 served 11/6 and 1 served 11/8.
11-16-82		PRETRIAL ORDER filed. JWP. Discovery to close 3/11/83. Pretrial 5/9/83 at 2:30 p.m. Jury trial (back-up) 6/21/83. Mag. impanel jury 6/20/83 at 9:00 a.m. Trial time 4 days. Parties granted to 4/11/83 to file pretrial pleadings and evid. motions. Parties to inform the re: jury and proceeding before the Mag. Pretrial motions to be filed by 3/11/83. Copies mld. (11/16/82)

DATE	N.R.	PROCEEDINGS
12- 1-82	35	*ANSWER of 3rd-pty. defts.* filed. Mld.
12-10-82	36	MEMO of deft. Midwesco in support of motion for summary judgment filed. Mld.
12-16-82		MOTION of pltf. for ext. of time to respond to deft. Midwesco's motion for summary judgment filed. Mld.
12-21-82		ORDER granting pltf. to 1/20/83 to respond to deft. Midwesco's motion for summary judgment filed. JWP. Copies mld.
1-21-83		MOTION of pltf. for ext. of time to respond to deft. Midwesco's motion for summary judgment filed. Mld.
1-26-83		ORDER granting pltf. to 1/31/83 to respond to Midwesco's motion for sum. judg. filed. JWP. Copies mld. (1/26/83)
2- 2-83	37	OPPOSITION of pltf. to deft. Midwesco's motion for summary judgment filed. Mld.
2-16-83		STIP. & ORDER ext. time to 3/1/83 for deft. to reply to opposition to motion of Midwesco for sum. judgment filed. JWP. Copies mld. (2/16/83)
2-24-83		NOTICE to take deposition, behalf of pltf. filed. Mld.
3- 3-83		STIP. & ORDER ext. time to 5/5/83 for parties to complete discovery and pursue settlement filed. JWP. Copies mld. (3/3/83)

DATE	N.R.	PROCEEDINGS
3- 3-83	38	REPLY of deft. Midwesco to opposition to motion for sum. judg. filed. Mld.
3-18-83	39	OPPOSITION (supp.) of pltf. to deft. Midwesco's motion for summary judgment filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
4- 7-83		NOTICE VACATING & RESETTING pretrial for 5/23/83 at 3:30 p. m. mld. to all counsel.
4-20-83		NOTICE of deposition, behalf of pltf. filed. Mld.
4-27-83	40	MEMO. & ORDER filed. JWP. Deft. Midwesco's motion for sum. judg. denied in part and held in abeyance in part until after 5/20/83. Parties granted 10 days to seek leave to participate in 5/20/83 hrg. in Case C 82-512. Copies mld.
5-10-83		PLTF's petition for leave to participate in hearing of C 82-512 on 5/20/83 at 2:00 p.m. filed.
5-11-83		MOTION of deft. & 3rd party plft. Midwesco to vacate trial date of 6/20/83 filed. Mld.
5-12-83		ORDER (endorsed on motion) granting pltf. leave to participate. Filed.
5-20-83		MIN. of PRO. filed. JWP. Oral argument on motion for sum. judg. begun & concluded. Pltf. granted to 5/27/83 to file

DATE	N.R.	PROCEEDINGS
		supp. brief. Deft. granted to 6/7/83 to respond.
5-31-83		PRETRIAL ORDER filed. JWP. Discovery to close 7/18/83. Jury trial 4/24/84 (certain) 8/1/83 (back-up). Parties to inform the Court re: Mag. Trial date 6/21/83 vacated. Parties granted to 7/18/83 to file pretrial pleadings and evid. motions. Jury notice attached. Copies mld.
7-13-83		MOTION of pltf. to vacate trial date of 8/1/83 and vacate discovery date of 7/18/83 filed. Mld.
7-18-83		ORDER (endorsed on motion) vacating trial date of 8/1/83 and discovery date 7/18/83 filed. JWP. Copies mailed. (See P/T Order of 5/31/83)
7-20-83	*	MOTION of defts. Stoker Corp. and Joseph Stenglein to vacate 8/1/83 trial date and vacate discovery completion date of 7/18/83 filed. Mld.
		*Note 7/18/83 Order.
7-25-83		MEMO & ORDER filed. JWP. Third party defts' motion to vacate trial date & discovery date DENIED AS MOOT. Copies mailed.
8- 8-83	41	DEPOSITION of Krishnagiri Iyengar filed.
8- 8-83	42	DEPOSITION of Kenneth R. Harrison filed.
8- 8-83	43	DEPOSITION of Clinton C. Boushell filed.
9-30-83	44	DEPOSITION of Dale Lowery filed.
9-30-83	45	DEPOSITION of Lee Roy Coy filed.

DATE	N.R.	PROCEEDINGS
9-30-83	46	DEPOSITION of Richard Wolery filed.
11-21-83		NOTICE of deft. Joseph Francis Stenglein of appointment of executor filed. Mld.
3- 6-84	47	MEMO & ORDER filed. JWP. Deft. Midwesco's s.j. motion granted/denied in part. Pltf's claims against deft. Midwesco dismissed. Pretrial set for 3/19/84 at 11:30 a.m. Copies mld.
4- 4-84	48	NOTICE OF APPEAL of pltf. filed. Copies by clerk to: Dombey, Steinhart, Bamman, Bornstein, Simiele, Britz on 4/4/84.
4- 4-84		TRANS. FORM with certified copies of: docket entries, Memo & Order of 3/6/84, and notice of appeal mld. to Sixth Circuit.
4-12-84		ACKNOWLEDGED RECEIPT for Sixth Circuit, docketed 4/9/84, #84-3275.
4-12-84		TRANSCRIPT ORDER form of pltf. re: transcript is unnecessary for appeal purposes. Filed. Mld.
4-18-84		TRANS. FORM with *certified record* on appeal, 2 vols. of pleadings, & 6 vols. of depositions mld. to Sixth Circuit.
4-27-84		ACKNOWLEDGED RECEIPT of certified record on appeal filed 4/24/84.
8- 8-84	49S	STIP & ORDER granting settlement of case between deft. Midwesco & all 3rd party defts. except Int'l Boiler Works filed. JWP. Copies mld.
8- 8-84		TRANS. FORM with certified copy of docket sheet and 1 supplemental pleading (49s) mld. to Sixth Circuit.

DATE	N.R.	PROCEEDINGS
8-21-84		ACKNOWLEDGED RECEIPT of supplemental pleading for Sixth Circuit filed 8/13/84.

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

ATTEST: James S. Gallas, Clerk
U.S. District Court
Northern Dist. of Ohio

By: Vickie L. Lorenzen

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Bendix Autolite Corporation,

Plaintiff Case No. C 80-750

vs.

Midwesco Enterprises, Inc., et al., MEMORANDUM AND ORDER

Defendants (Filed April 27, 1983)

POTTER, J.:

This cause came to be heard on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

The statute of limitations in Ohio for an action for breach of a contract for the sale of goods is four years. O.R.C. § 1302.98. The statute of limitations for a fraud action is also four years. O.R.C. § 2305.09(c). The affi-

davit of David Miller, a copy of which is attached as Exhibit A to Midwesco's memorandum, states that Bendix commenced beneficial use of the boiler system on July 3, 1975. Midwesco has moved for summary judgment dismissing the complaint, based on its contention that the action is time-barred under the statute of limitations.

The critical issue raised by Midwesco's motion is the applicability and effect of the Ohio Tolling Statute, O.R.C. § 2305.15, which states:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Midwesco is an Illinois corporation which during all relevant time periods was not authorized to do business in Ohio and had not appointed an Ohio agent for the service of process. However, Midwesco asserts that since it was continually subject to the long arm jurisdiction of the Ohio courts during the relevant limitations period, the statute of limitations was not tolled and Bendix's action is now time barred. Midwesco further asserts that a contrary interpretation of the Tolling Statute would be in violation of the Commerce and Due Process clauses of the United States Constitution.

Initially, the Court is asked to interpret the decision of the Ohio Supreme Court in *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 269 N.E. 2d 121 (1971). Midwesco asserts that *Seeley* "simply held that the Tolling Statute applies to a non-resident owner or operator of a motor vehicle, regardless of amenability to service of process," and that the decisions of some lower courts of Ohio and Ohio District Courts interpreting *Seeley* as changing the Ohio Supreme Court's prior distinction between individuals and corporations were wrong.

In *Ohio Brass Co. v. Allied Products Corp.*, 339 F. Supp. 417 (N.D. Ohio 1972), Judge Green analyzed *Seeley* as follows:

> In *Seeley* non-resident plaintiffs were involved in an auto accident in Lucas County, Ohio with a truck driven by a non-resident employee of a Michigan corporation. Suit was filed in Ohio against the driver and his employer after the applicable statutes of limitation had run. The Ohio Supreme Court postulated the issue before it thereby:
>
> > The most troublesome question presented by this case is whether such a "savings clause" is or should be applicable to toll a statute of limitations in cases where there is no need for such tolling; in cases where suit may be commenced *at any time* and a judgment *in personam* obtained despite the absence of the defendant from the state of Ohio. 26 Ohio St.2d 61, 65, 269 N.E.2d 121, 125.
>
> The conclusion of the court was that:
>
> Were this a question of first impression in Ohio, the adoption of such a rule might be justified upon the basis that the purposes to be served by tolling the statute of limitations are necessarily so interwoven into the statute—even though not expressed—that the application of the statute is limited to cases where suit

> cannot be instituted because the defendant is not amenable to process.
>
> • • • • •
>
> Any rule establishing the inapplicability of the "savings clause" to situations where a defendant is amenable to process could not logically make any distinction as to the type of process. It logically would have to apply regardless of whether the nonresident was amenable to process under R.C. § 2703.20, under the "long-arm" statutes, R.C. §§ 2307.38.2 and 2307.38.4, or by some other method. It likewise would apply where service of process is not needed to obtain a personal judgment, e.g., cognovit judgments.
>
> • • • • •
>
> Defendants urge this court to reexamine the position taken in *Commonwealth* and *Couts*. They point out that a majority of the states, with comparable "savings clause" statutes, have taken the view that the statute of limitations is not tolled under circumstances of amenability to process. Their position presents a very persuasive argument for change in the existing Ohio law in such respect. We conclude, however, that a change of the law by court "interpretation" at this time would be violative of the basic rules of statutory interpretation. In the second paragraph of the syllabus of Slingluff v. Weaver (1902), 66 Ohio St. 621, 64 N.E. 574, this court held:
>
> > ". . . The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has

plainly expressed, and hence no room is left for construction.

The literal language of the Ohio "savings clause" is tied to the tolling of acts which prevent *personal service* in Ohio rather than to acts which would prevent any judgment *in personam*. Even assuming that a legislative intent to the contrary might have been inferred prior to judicial determination by this court rejecting such a position, principles of *stare decisis* and legislative acceptance should preclude the overruling of *Commonwealth* and *Couts* at this time.

* * * * *

In accordance with our holding in Couts v. Rose (152 Ohio St. 45, 40 O.O 482, 90 N.E.2d 139), we conclude that the provisions of R.C. § 2305.15, tolling the running of the Ohio statutes of limitations during the time a defendant is absent from the state of Ohio, are applicable despite the fact that suit could have been brought in Ohio at any time after the automobile accident . . . id., pp. 67, 69-70, 71, 71-72, 73, 269 N.E.2d 126, 127, 128-129.

When called upon to distinguish Tompson v. Horvath, supra, and Title Guaranty & Surety v. McAllister, supra, the court pointed out that each involved a corporation which had originally been subject to service of process in Ohio. However, the court further quoted the language from the *Horvath* decision which found a difference between corporate and individual defendants. The incorporation of that delineation is quite mystifying, in that the Ohio Supreme Court had before it both a corporate and an individual defendant, and applied the same rule to each.

The only reasonable conclusion to be drawn from the decisions of the Ohio Supreme Court, at least to date, is that a foreign corporation upon which personal service in Ohio could not be had is absent from the state within the meaning of O.R.C. § 2305.15, and that the statute of limitations does not run against such corporation until such time as it is subject to personal service in Ohio, regardless of the fact that an Ohio court could have acquired *in personam* jurisdiction over such corporation by virtue of substituted service.

This same interpretation was followed in *Durham v. Anka Research Limited*, 61 Ohio App. 2d 239, 396 N.E.2d 799 (1978); *Scheer v. Air-Shields, Inc.*, 61 Ohio App. 2d 205, 401 N.E.2d 478 (1978); *Bruck v. Eli Lilly & Co.*, 523 F. Supp. 480 (S.D. Ohio 1981); and *Mead Corporation v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (1979).

Therefore, this Court concludes that under Ohio law, the application of the Savings Clause, O.R.C. § 2305.15, to toll the statute of limitations depends on whether personal service may be made on defendants within the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d at 72. If the defendant is not amenable to personal service within the State of Ohio, it is deemed to be "out of state," even though substitute service may be made on the defendant by means of Ohio's long-arm statutes. *Id.* at 69. A defendant who is "out of state" is not protected by Ohio statutes of limitation, as the statute does not begin to run against that defendant as long as it is out of the state. Conversely, if a defendant is not out of the state, the statute of limitations runs its natural course and is not tolled by the Savings Clause.

It is clear that Midwesco was neither registered to do business in Ohio nor represented in Ohio for purposes of

service of process during the relevant time period. Exhibit A attached to Midwesco's memorandum. Therefore, Midwesco was "out of state" during this time and the statute of limitation was tolled pursuant to O.R.C. § 2305.15.

Midwesco next argues that the Ohio Tolling Statute imposes an impermissible burden on interstate commerce and violates the due process clause of the Fourteenth Amendment.

This Court is to hear argument on this same issue in the case of *Copley v. Heil-Quaker*, No. C 82-512, on May 20, 1983, at 2:00 P.M. The parties in the present action may seek leave of court, within ten days of this order, to participate in that hearing.

THEREFORE, for the above stated good cause appearing, it is

ORDERED that Midwesco's motion for summary judgment as to the effect of O.R.C. § 2305.15 should be, and hereby is, DENIED, and it is

FURTHER ORDERED that Midwesco's motion for summary judgment as to the constitutionality of the Ohio Tolling Statute should be, and hereby is, held in abeyance until argument is heard on this issue in the case of *Copley v. Heil-Quaker*, No. C 82-512, on May 20, 1983 at 2:00 P.M.; and it is

FURTHER ORDERED that the parties in this action may seek leave of court, within ten days of this order, to participate in the May 20, 1983 hearing.

/s/ John W. Potter
United States District Judge

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: April 27, 1983
James S. Gallas, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Bendix Autolite Corporation,

Plaintiff Case No. C 80-750

vs.

Midwesco Enterprises, Inc., et al., MEMORANDUM AND ORDER

Defendants (Filed March 8, 1984)

POTTER, J.:

This matter is before the Court on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto, defendants' reply and plaintiff's supplemental response. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

This Court in a memorandum and order filed April 27, 1983 denied that portion of defendant Midwesco's motion for summary judgment which argued that plaintiff's action was time barred under the statute of limitations. This Court reserved the issue of whether the Ohio Tolling Statute, O.R.C. § 2305.15, imposed an impermissible burden on interstate commerce and whether O.R.C. § 2305.15 violated the due process clause of the Fourteenth Amendment. Because this Court was to hear oral argument on these same issues in the case of Copley v. Heil-Quaker, No. C 82-512, the Court permitted the parties to participate in that hearing. The issues herein are presented on the pleadings, memoranda, affidavits and oral arguments.

Defendant Midwesco has argued that the provisions of O.R.C. § 2305.15 violate the Commerce Clause under either a *per se* or a balancing test. Defendant Midwesco also has argued that O.R.C. § 2305.15 violates the due process clause of the Fourteenth Amendment because a state cannot regulate foreign corporations doing business within the state's borders by imposing conditions on the corporation which require relinquishment of constitutional rights.

The Court will first consider defendant Midwesco's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v.*

Brice Church, Inc., 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc., supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc., supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra*, remanded the case to the district court for a de-

cision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less

onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., ***supra*** **at 13-14.**

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Midwesco, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process

easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Midwesco, because they violate the Commerce Clause.

Having found that the provisions of O.R.C. § 2305.15 violate the Commerce Clause, the Court does not reach defendant Midwesco's due process arguments.

Finally, plaintiff has argued that defendant Midwesco should be estopped from asserting a statute of limitations defense because defendant Midwesco promised over a four year period to repair defects in the boiler system and failed to do so. Plaintiff alleges that it reasonably relied upon defendant Midwesco's representations in forebearing to institute this lawsuit. Plaintiff also argues that under Ohio law the statute of limitations on fraud does not begin to run until the fraud is discovered. According to plaintiff, it first learned of defendant Midwesco's fraud in knowingly installing a boiler system which did not meet specifications on August 24, 1979. Therefore, plaintiff argues that its action filed December 19, 1980 was filed well within the four year statute of limitations for fraud.

As defendant points out, plaintiff has failed to support these arguments with any affidavits which establish that genuine issues of material fact exist on either the issue of estoppel or fraud. Therefore, the Court finds that no genuine issue on either of these arguments exist for trial. See Fed.R.Civ.P. 56(e).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant Midwesco's motion for summary judgment be, and hereby is, DENIED in part and GRANTED in part; and it is

FURTHER ORDERED that plaintiff's claims against defendant Midwesco be, and hereby are, dismissed; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on defendant Midwesco's third party claims on March 19, 1984 at 11:30 A.M.

/s/ John W. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Copley, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. C82-512
	)	
vs.	)	
	)	Judge John W. Potter
Heil-Quaker Corporation, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT

COUNTY OF ERIE)
) ss:
STATE OF OHIO)

I, James T. Murray, being first duly sworn, depose and state as follows:

1. I am the attorney of record for William Copley, Patsy Copley and Dale Copley, the plaintiffs in the above-captioned proceeding, and I make this affidavit as part of plaintiffs' response to Heil-Quaker's supplemental reply in support of Heil-Quaker's motion asking the Court to dismiss the complaint.

2. Subsequent to Mr. Stanley Lipnick's affidavit with a letter attached from Patricia Mell, Corporations Counsel for the Ohio Secretary of State's office, I caused inquiry to be made to the same person. Those inquiries directed to Patricia Mell revealed to affiant that the precise issue before the Court had not been presented to Patricia Mell, all as more fully set forth in Exhibit A attached hereto and by reference incorporated herein.

3. When the precise issue before this Court was presented to corporations counsel for the Secretary of State's office, it was made clear that a foreign corporation, if in fact it was shown to be strictly interstate in nature, could designate a statutory agent without being required to obtain a license to do business in the State of Ohio.

4. Affiant's inquiries prompted the December 22, 1983 letter from Patricia Mell in which she emphatically qualifies her September 14, 1983 letter directed to Mr. Stanley Lipnick.

Further affiant sayeth not.

/s/ James T. Murray
James T. Murray
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorney for Plaintiffs

Sworn to before me and subscribed in my presence this 29th day of December, 1983.

/s/ Lori L.E. Richard
Notary Public

LORI L.E. RICHARD
Notary Public State of Ohio
My Commission Expires
Nov. 19, 1985

I hereby certify that this instrument is a true and correct copy of the original on file in my office

ATTEST: James S. Gallas, Clerk
U.S. District Court
Northern Dist. of Ohio

By: Vicki L. Lorenzen
Deputy Clerk

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Copley, et al.,

Plaintiffs,

vs.

Heil-Quaker Corp., et al.,

Defendants.

Case No. C 82-512

MEMORANDUM
AND ORDER
(Filed March 8, 1984)

POTTER, J.:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., C 83-682. This case was transferred to this Court from the District of Minnesota, Fourth Division, pursuant to the provisions of 28 U.S.C. § 1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that an December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are conducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio.

Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the concortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. § 2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. § 2305.16 provides that, as to him, the two-year period of

limitations would commence to run when his minority terminated. Thus his time to assert him claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. § 3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. § 2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed . . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that § 2305.15, as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that § 2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-

Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to be business pursuant to O.R.C. § 1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contract required for suit in Ohio. Under the Due Process Clause and the "minimum contracts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), Heil-Quaker further argues that § 2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically § 1703.02 and § 2305.15, constitute a trap for unwary sellers.

Heil-Quaker also asserts that § 2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their business. Finally, Heil-Quaker argues that § 2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates

even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc., supra,* at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc., supra,* at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jerseys tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hearing the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without

registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra,* remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the

same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.

For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's.

Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. § 111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.* 14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant parts as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons, supra,* at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. § 111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mell, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has

changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricia Mell, dated September 14, 1983, in which Ms. Mell indicated as follows:

> Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. § 2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. § 2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in Minnesota. That court dismissed plaintiff's claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. § 2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. § 2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. § 2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. § 2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St.3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plaintiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of the CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. § 2072. Plaintiffs, in the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dis-

miss and ordered the case transferred to this Court pursuant to the provisions of 28 U.S.C. § 1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. § 2305.10 and that any tolling provisions set forth in O.R.C. § 2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED: and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ John W. Potter
United States District Judge

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1. The argument that the provisions of O.R.C. § 2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

EXHIBIT A

Secretary of State
(SEAL) Sherrod Brown

December 22, 1983

Murray & Murray Co., L.P.A.
Attn: James T. Murray
Murray Building
300 Central Avenue
Sandusky, Ohio 44870

Dear Mr. Murray:

This letter is written in response to your inquiry concerning my September 14, 1983 correspondence with Mr. Stanley Lipnick, Esq. of Chicago.

My letter to Mr. Lipnick merely stated a conclusion based on facts not presented in the letter. I hope this response will remedy any existing ambiguities by discussing the facts and issue you now present.

The question raised was whether the Secretary of State automatically, and in the ordinary course of business, accepts a designation of agent from a foreign unlicensed corporation. As I indicated in my letter to Mr. Lipnick, the answer to this question is in the negative. However, if a thorough investigation of the foreign unlicensed corporation determined that the corporation was strictly interstate in nature, there is nothing in the Ohio corporations laws which either prohibits such a filing or requires this office to accept it.

It is a long standing position that the states have a general privilege to exclude foreign corporations or to admit them upon certain terms and conditions. These conditions are certainly limited by both the state and federal constitutions and, as the power to regulate interstate commerce is conferred by the United States Constitution, no state can absolutely exclude a corporation engaged in interstate commerce. The state can however, impose conditions upon the foreign corporation's admission to the state.

14th Floor State Office Tower Columbus, Ohio 43216
614/466-2530

Before a foreign corporation can establish a presence in Ohio, it must apply for a license and concurrently designate an agent. The designation of an agent without a license would, on its face, be an attempt by the corporation to acquire a presence in Ohio without the attendant formality of licensure. Ohio corporations laws do not require the office to accept such a filing. Even so, the legislature did give the Secretary of State discretion to accept for filing pertinent documents not required by law to be filed. The Secretary of State would not merely accept a designation of agent presented under circumstances such as these since the facts presented support the presumption that the foreign corporation is engaged in business in Ohio without the benefit of a license and is attempting to circumvent the law by filing a designation of agent.

If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

I hope that this discussion has put the matter in its proper prespective.

Very truly yours,

/s/ Patricia Mell
Patricia Mell
Corporations Counsel

PM/ral

Secretary of State
(SEAL) Sherrod Brown

September 14, 1983

Stanley M. Lipnick, Esq.
Arnstein, Gluck & Lehr
75th Floor, Sears Tower
Chicago, Illinois 60606

Dear Mr. Lipnick:

Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

Very truly yours,

/s/ Patricia Mell
Patricia Mell
Corporations Counsel

PM/ral

14th Floor State Office Tower Columbus, Ohio 43216
614/466-2530

No. 87-367

In The
Supreme Court of the United States
October Term, 1987

BENDIX AUTOLITE CORPORATION,
Appellant,

-v.-

MIDWESCO ENTERPRISES, INC.,
Appellee.

INTERNATIONAL BOILER WORKS COMPANY,
Third Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANT

NOEL C. CROWLEY
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Attorneys for Appellant

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THE QUESTIONS PRESENTED

1. Does the Ohio tolling statute (Ohio Rev. Code § 2305.15) impermissibly burden interstate commerce by denying foreign corporations the protection of the statute of limitations during such times as they cannot be served with process within the state?

2. Does the aforesaid tolling statute impermissibly burden commerce with respect to claims arising from contract, for which the tolling of the statute of limitations can be avoided by including in the contract itself a provision authorizing in-state service?

3. Should the decision invalidating the above statute have been given only prospective effect?

THE PARTIES

The plaintiff-appellant in this action is Bendix Autolite Corporation ("Bendix"), which as of March 29, 1985 was merged into The Bendix Corporation and ceased its separate existence. The Bendix Corporation was merged into Allied Corporation ("Allied") on April 1, 1985 and Allied Corporation was merged into Allied-Signal, Inc. on September 30, 1987.*

The defendant/third-party plaintiff-appellee is Midwesco Enterprises, Inc. The third-party defendant is International Boiler Works Company.

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* The subsidiary and affiliated corporations of Allied-Signal Inc. (other than those which are wholly owned) are Akebono Brake Industry Co., Inc. (Japan); Allied-General Nuclear Services (Delaware); Bendix Electronic Service Corporation (Spain); Bendix Group Superannuation Pty., Ltd. (Australia); Bendix Italia, S.p.A. (Italy); Bendix Mintex Proprietary Limited (Australia); Bendix-Jidosha Kiki Corporation (Delaware); Bunker Ramo Electronic Data Systems S.A. (Spain); Chico Corporation (Delaware); Compania Industrial ale Fluoreta, S.A. (Mexico); Compania Metalurgica de Parral, S.A. (Mexico); France Automobile Service, S.A. (France); Garrett Comtronics Licensing Corp. (Texas); Globe Auto Electricals Ltd. (India); Identitech Corporation (Delaware); Iminor, S.A. (France); Industrial Turbines International Inc. (New Jersey); Ingold Electrodes, Inc. (Massachusetts); International Turbine Engine Corporation (Delaware); La Decoration Moderne, S.A. (France); Leaseway All-Services, Inc. (Delaware); Manbritt Industries, Inc. (New York); Mitsuwa Construction Co. (Japan); Nikki-Universal Co., Ltd. (Japan); Nippon Amorphous Metals Co., Ltd. (Japan); Nippon Brake Safety Institute (Japan); Nirlon Synthetic Fibers and Chemicals, Ltd. (India); Normalair Garrett (holdings) Ltd. (United Kingdom); Oak Mitsui Inc. (New York); Prestolite of India Ltd. (India); Quimobasicos, S.A. (Mexico); Propelentes Mexicanos, S.A. (Mexico); Sanzillon-Clichy, S.A. (France); Serind S.p.A. (Italy); Sifra Industrie, S.A. (France); Sistemas Bendix de Seguridad S.A. de C.V. (Mexico); Societe Civile Immobiliere Prieur & Cie (France); Societe Wheelabrator-Allevard S.A. (France); Sofratype, S.A. (France); Sonic Oil Separation, Ltd. (Canada); Synektron Corporation (Oregon); Tecpro Industrial Chemicals Ltd. (United Kingdom); Turbo Services SNC (France); UM Holding B V (Netherlands); UMMS Caribbean N. V. (Aruba); UMP Chemicals, S.A. (United Kingdom); Union Texas Petroleum Holdings, Inc. (Delaware).

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit affirming the granting of summary judgment dismissing the complaint is reported at 820 F.2d 186 (1987). and included in the appendix to Bendix' Jurisdictional Statement, pp. 1a-6a. The unreported Memorandum and Order of the Federal District Court for the Northern District of Ohio dated March 8, 1984 granting summary judgment dismissing the complaint is included in the Joint Appendix, pp. 19-28. Also included in the Joint Appendix (pp. 31-47) is an unreported decision of the same District Court entered on the same day in the case of *Copley v. Heil-Quaker Corp.*, the two cases having been combined for hearing and argument because of the similarity of the issues presented.

STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal from a decision by the United States Court of Appeals for the Sixth Circuit declaring a particular statute (the so-called Ohio tolling statute—Ohio Rev. Code Ann. § 2305.15) to be invalid under the Commerce Clause of the United States Constitution.

The statutory basis for jurisdiction is 28 U.S.C. § 1254(2), relating to decisions by a court of appeals holding a state statute to be invalid as repugnant to the United States Constitution.

The Court of Appeals rendered its decision affirming the District Court on June 3, 1987. Notice of appeal was filed on August 26, 1987 in the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

The decisions of the lower courts were based on Article I, Section 8 of the United States Constitution (the Commerce Clause) giving Congress the power

> . . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

The State statute declared to have been unconstitutional is the Ohio tolling statute, Ohio Rev. Code Ann. § 2305.15 (sometimes referred to as the "Ohio savings clause"), which reads as follows:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

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STATEMENT OF THE CASE

Plaintiff-appellant Bendix in this action seeks to recover damages for breach of contract and fraud arising out of a written agreement under which defendant-appellee Midwesco sold and installed a coal-fired boiler system at Bendix' manufacturing facility in Fostoria, Ohio. This system was placed in service in July 1975 and the action was commenced in December 1980.

Midwesco moved for summary judgment, claiming that Bendix' right of action was barred by the four-year statute of limitations fixed by Ohio Rev. Code Ann. § 1302.98 for contract actions, and by Ohio Rev. Code Ann. § 2305.09 (c) for fraud actions. It was conceded that Midwesco was not authorized to do business in Ohio and had not appointed an agent for the service of process.

By decision and order dated April 27, 1983, the District Court denied Midwesco's motion insofar as it sought to interpret the tolling statute as not applicable because Midwesco was continually subject to the jurisdiction of the Ohio courts through long-arm service. The District Court's holding in that regard has never been appealed and is no longer in issue.

As part of the same decision, however, the court held in abeyance its decision on whether the tolling statute imposed an impermissible burden on commerce or was otherwise unconstitutional, noting that the same issue had also been raised in the case of *Copley v. Heil-Quaker Corp.*, which was then pending before it. The court arranged for the oral argument of both cases in a single hearing.

Thereafter and on March 8, 1987, the District Court rendered decisions in both the present case and the companion *(Copley)* case, in each case dismissing the complaints on the ground that the Ohio tolling statute impermissibly burdened interstate commerce. In both cases appeals were taken to the Court of Appeals for the Sixth Circuit, which affirmed both decisions. The decision in the case of Bendix was rendered on June 3, 1987.

Plaintiff-appellant argued in both the District Court and the Court of Appeals that there was no impermissible burden on commerce, and specifically argued that Midwesco could have avoided the detrimental effect of the tolling statute either by including in its contract with Bendix a provision designating an agent on whom Bendix might serve process for claims related to that particular transaction, or by filing a designation with the Ohio Secretary of State, notwithstanding that it had not qualified to do business in Ohio.

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SUMMARY OF ARGUMENT

In Part I of its argument, Bendix assumes *arguendo* that by reason of the Ohio tolling statute, foreign corporations which engage in Ohio-related interstate commerce must choose between obtaining a license to do business or forfeiting the protection of the statute of limitations. While denying that this would constitute "forced licensure" as contended by the courts below, Bendix distinguishes the Ohio statute from legislation found to unduly burden commerce in other cases, showing that it is not protectionist in nature, does not impede the movement of goods, does not address a subject requiring uniform regulation, and applies evenhandedly to residents and nonresidents alike. Bendix also argues that the local benefits of such a statute, having been recognized in a prior decision of this Court as valid and legitimate, outweigh any incidental or indirect impact on interstate commerce. Much of this argument is devoted to the proposition that because the operation of the Ohio statute is necessarily restricted to Ohio-based litigation, the statute does not pose even a theoretical burden to those entities which are beyond the reach of the Ohio courts on the basis of due process considerations, as such entities will have no occasion for invoking the limitations defense. The continued availability of a laches defense is also noted, as is the fact that the limitations defense has never been regarded as a natural or fundamental right.

Part II of the argument explains why the lower courts were mistaken in treating licensure to do business as the only means for appointing an in-state agent for service and thus avoiding the strictures of the tolling statute. Here it is explained that there were two alternative methods by which Midwesco could have appointed an agent for the service of process, neither of which would have necessitated registering to do business or surrendering to the general jurisdiction of the State. One such method was the private designation of an Ohio-based agent, either as part of the contract on which this action is based or by unilateral declaration, with limited authority to receive process in claims arising from the contract itself. Another method was the public filing of an agency designation, with or without limitations of authority, in the Office of the Ohio Secretary of State under a procedure recognized and approved in a letter signed by a spokesperson for that office and included in the Joint Appendix, pp. 48-49.

Part III argues that any invalidation of the Ohio savings clause should be prospective only in accordance with the non-retroactivity standards promulgated by this Court.

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ARGUMENT

I. THE OHIO STATUTE'S BURDEN ON INTERSTATE COMMERCE, IF IT EXISTS AT ALL, IS NONDISCRIMINATORY, INDIRECT AND NOT EXCESSIVE IN RELATION TO ITS LOCAL BENEFITS.

The impact on interstate commerce of a limitations tolling statute of the sort considered herein has been characterized by a member of this Court as "fairly negligible". (See opinion of Chief Justice (then Justice) Rehnquist, hereinafter discussed in detail, dissenting from this Court's denial of certiorari in *Honda Motor Co. v. Coons*, 469 U.S. 1123, 1126 (1985) (hereinafter "the Honda dissent")).

Furthermore, legitimate state interests for the creation of a limitations tolling statute of the type now represented by the Ohio savings clause were explicitly recognized by this Court in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), also discussed *infra*.[1]

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[1]The *Searle* case involved a constitutional challenge to a New Jersey statute essentially identical to the Ohio savings clause. This Court upheld the statute insofar as it was contended that by denying certain foreign corporations a statute-of-limitations defense, the state had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court declined to rule, however, on the issue now squarely presented here, *i.e.*, whether conditioning the limitations defense on the availability of in-state service of process constitutes an impermissible burden on interstate commerce. The Commerce Clause issue was left open partly because the lower (New Jersey) courts had not considered it. *Id.*, 455 U.S. at 413. Another reason was that a majority of the Justices found themselves unable to deter-

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The courts below, prior to the Honda dissent but with full knowledge of this Court's ruling in *Searle*, nevertheless found that the burden on interstate commerce supposedly brought about by the Ohio savings clause rendered it *per se* illegal under the principles established in

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mine from the record whether New Jersey law allowed foreign corporations to appoint in-state agents to receive process by some means other than licensure to do business, a process that would have entailed submission to the jurisdiction of the state for all purposes. *Id.*, at 413-14. This case was accordingly remanded to the Third Circuit Court of Appeals for clarification as to the requirements of New Jersey law in this regard (*id.*, at 414), and was in turn remanded by that court to the United States District Court as part of a consolidated order which also applied to another lawsuit. *Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301, 302 (3d Cir. 1982). The District Court elected to await the resolution of the same issue in a proceeding entitled *Honda Motor Co. v. Coons* which was then pending before the New Jersey Supreme Court in consequence of its having been remanded by this Court (see *Honda Motor Co. v. Coons*, 455 U.S. 996 (1982)) for further consideration in the light of this Court's *Searle decision*. Thereafter, the New Jersey Supreme Court, in *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) ("*Coons I*"), declared that under New Jersey law, a corporation not organized in that state and not represented there by any person upon whom process may be served can gain the benefit of the statute of limitations only by obtaining a license to do business. *Id.*, 94 N.J. at 315-16, 463 A.2d at 925. The New Jersey court further holding to the effect that the statute as thus interpreted impermissibly burdened interstate commerce is discussed *infra*. This decision in *Coons I* was modified upon petition for rehearing in *Coons v. American Honda Motor Co.*, 96 N.J. 419, 476 A.2d 763 (1984) ("*Coons II*"), by making the invalidation of the tolling statute prospective only and thus of no consequence to the litigants, using the standards enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Review by this Court of the *Coons I* decision was applied for, but certiorari was denied over the dissenting written opinion of Rehnquist, C. J., as earlier noted and as hereinafter discussed. A more detailed explanation of the intertwined procedural histories of *Searle* and *Coons* appears in *Coons II*, 96 N.J. at 422-24, 476 A.2d at 765-67.

Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Alternatively, the lower courts found that the Ohio statute constituted a burden on commerce which was "clearly excessive in relation to the putative local benefits" on the basis of the balancing test authorized in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[2]

If the courts below had actually analyzed the operation and function of the Ohio savings clause, either in its general application or in relation to the facts in this case, they would have found its supposed burden on commerce to be entirely different in both nature and degree from anything identifiable as a violation of the Commerce Clause on the basis of this Court's prior decisions.

The statute here in issue is not a law that even concerns articles of commerce or the movement of goods, much less one that violates the Commerce Clause because it "overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. at 624. There is nothing in the nature or history of the statute to suggest a parochial or protectionist purpose of the sort examined in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679-87 (1980) (concurring opinion

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[2]This case raises no issue of federal preemption or inconsistency with federal regulation and thus concerns only the so-called dormant Commerce Clause, under which state actions may be deemed incompatible with the mere existence of the power granted the federal government. See, e.g., *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. —, —, 95 L.Ed.2d 67, 84 (1987); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) ("The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.")

of Brennan, J.), in which one state pitted its own interests against those of its neighbors. Certainly there is no suggestion of any economic protectionism of the sort condemned in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-73 (1984); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 351-53 (1977); or *Philadelphia v. New Jersey*, 437 U.S. at 624-27. Most assuredly, the Ohio savings clause is not a regulation of the sort identifiable as a *per se* Commerce Clause violation because "its effect is to favor in-state economic interests over out-of-state interests", as was explained in *Brown-Forman Distilleries Corp. v. New York State Liquor Authority*, 476 U.S. —, —, 90 L.Ed.2d 552, 559 (1986). If anything, the present statute provides an incentive for both foreign and domestic corporations to remain in competition by continuing their Ohio presence. Whatever detriment the statute may occasion is as likely to be experienced by localized business units which at some point withdraw from Ohio's intrastate commerce as by those which might choose to participate exclusively in interstate commerce, but only if they can do so without providing for in-state service.

The Ohio savings clause must also be sharply distinguished from statutes found to be invalid because they discouraged nonresidents from carrying on a particular trade or business. *E.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42-44 (1980). *Cf., Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876-78 (1985).

Perhaps most important is that the Ohio savings clause does not discriminate against interstate commerce, and is thus not among the class of statutes identified in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —,

95 L.Ed.2d at 84, as "[t]he principal objects of dormant Commerce Clause scrutiny." Such discrimination is properly found, according to this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 42, if a statute differentiates "among affected business entities according to the extent of their contacts with the local economy". The Ohio savings clause makes no such differentiation, but as the ensuing text will explain in detail, is nondiscriminatory in that it "visits its effects equally upon both interstate and local business", *id.*, 447 U.S. at 36; "regulates evenhandedly to effectuate a legitimate local public interest", *Pike v. Bruce Church, Inc.*, 397 U.S. at 142; and constitutes "a regulation of general application" which is "applicable alike to 'any person, firm or corporation' " within its prescribed ambit, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). As this Court well knows, "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

It is likewise quite certain that the area of commerce affected by the Ohio statute is not one in which uniformity of regulation is necessary and in which local interference is accordingly not permissible, under the authority of such cases as *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —, 95 L.Ed.2d at 84; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444 (1960); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Statutes of limitations have always represented matters of local concern. While in the case of federally-created causes of

action there are occasional lamentations that Congress should provide uniform periods of limitation more frequently than it does, *e.g.*, *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986), it is doubtful that any such national uniformity has ever been seriously advocated for cases governed by state law.

There are also obvious dissimilarities between the Ohio statute and the type of state statute invalidated by this Court in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), which denied a company engaged solely in interstate commerce the right to enforce its claims in the courts of that state. Here there was no exclusive targeting of nonresidents as such and no attempt to deny an interstate business the rewards of its lawful endeavors. And while access to the courts is a constitutionally protectable right, this Court's *Searle* opinion (455 U.S. at 408) includes the reminder (by quotation from *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)) that the protection of a statute of limitations is not a natural or fundamental right, and exists if at all solely as a matter of legislative grace.

As noted, the existence of valid state interests in wanting claims to be enforceable through in-state service is no longer a matter of argument or debate, having been conclusively established in this Court's *Searle* opinion with respect to the similar New Jersey statute there in question. Rejecting the argument that the advent of long-arm jurisdiction eliminated any legitimate basis for favoring service within the state, this Court found continuing justification in the fact that, "the unrepresented foreign corporation remains potentially difficult to

locate", even though the whereabouts of the prominent defendant in that lawsuit were well known. *Searle*, 455 U.S. at 409-10. Further justification was found in the fact that long-arm service in New Jersey was not "simply an alternative to service within the State", but entailed the additional burden of proving that in-state service could not be effected, and of otherwise demonstrating compliance with the statutory provisions intended to insure due process. The Ohio courts are also vigilant in insuring that long-arm service conforms to the limitations of due process, and that the lawsuit in question falls within one of the statutory categories for which long-arm service is appropriate. *E.g., Busch v. Service Plastics, Inc.*, 261 F. Supp. 136 (N.D. Ohio 1966); *Culp v. Polytechnic Institute*, 7 Ohio App. 3d 352, 455 N.E.2d 698 (1982).

That the *Searle* holding was limited to due process and equal protection issues does not affect its precedential value in this regard, since the existence of a legitimate state interest does not become a different issue merely because it now arises in a Commerce Clause setting.[3]

In examining the supposed burden on interstate commerce, it should be recognized at the outset that a significant and presumably sizeable portion of that commerce, even if it were to be transacted with persons located in Ohio and even if it were to generate lawsuits based on events occurring in that jurisdiction, remains totally unaffected by the Ohio statute. This situation exists simply

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[3]This is not to suggest that matters concerning the operation or significance of a state interest (as opposed to the existence thereof) present the same issue regardless of whether they arise in a commerce clause or equal protection context. This Court noted the contrary in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876 n.6 (1985).

because the interstate participants, being beyond the reach of the Ohio courts, have no need for the protection of an Ohio statute of limitations. This immunity from Ohio jurisdiction does not result from any forbearance by the state of Ohio in the assertion of long-arm jurisdiction. It exists instead simply because it is still possible under the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and despite the progressive expansion of state extraterritorial jurisdiction noted in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957), to engage in Ohio-related activities and to spawn Ohio-related lawsuits without becoming subject to the general jurisdiction of that State, and in some instances without becoming subject to even a limited jurisdiction over matters arising from specific contacts with the particular state.

Thus in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), this Court refused to countenance a state's assumption of jurisdiction where the locality in question was not part of the market regularly served by the defendant manufacturer, and was connected to the defendant only on the basis of an isolated occurrence involving one of its products. More recently, this Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in holding that a publisher charged with libel was subject to New Hampshire jurisdiction because its magazines were sold there, stressed that the publisher had "continuously and deliberately exploited the New Hampshire market". *Id.*, 465 U.S. at 781. And despite the continuous nature of the publisher's New Hampshire dealings, this Court took pains to observe, "respondent's activities in the forum may not be so substantial as to support jurisdiction over a

cause of action unrelated to those activities." *Id.*, 465 U.S. at 779. More recently, this Court in *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. —, —, 94 L.Ed.2d 92, 104 (1987), further extended the protection of the Due Process Clause in this regard by declaring that the "minimum contacts" rule could not be satisfied by the defendant's mere "awareness that the stream of commerce may or will sweep the product into the forum state".

A recent example of a case in which the "minimum contacts" standard of *International Shoe* and its progeny barred the assertion of personal jurisdiction is *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982). In that case there were express findings that the defendant had been transacting business within the forum state (*id.*, 677 F.2d at 653), that service of process had been effected in full compliance with the state's requirements for long-arm service, and that the transaction in question (a contract to produce animal feed which was fully performed in that same jurisdiction) was also the subject matter of the lawsuit. Nevertheless, the totality of the defendant's contacts with the jurisdiction in question was insufficient to satisfy the due process requirement.

It is thus apparent that the total population of individuals and firms falling within the coverage of the Ohio savings clause may be divided into three separate categories, and that only one of these categories involves even a theoretical impact on interstate commerce. The categories are as follows:

> I. *Intrastate actors not servable in Ohio.* This category encompasses all potential defendants who incurred liability on the basis of purely intrastate activity but ceased to be servable within the State, in most instances because they left the jurisdiction. Included, therefore, are all former residents and former sojourners, including domesticated foreign corporations which have abandoned their intrastate activities. Also included are all current residents whose whereabouts are unknown.
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> II. *Interstate actors beyond the reach of the Ohio courts on due process grounds.* This category is reserved for those persons and firms who became liable to Ohio citizens on the basis of some interstate transaction or event and could be sued if they were present within the state, but whose actual contacts with Ohio are insufficient for the assertion of personal jurisdiction through long-arm service of process.
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> III. *Interstate actors subject to Ohio's long-arm jurisdiction.* This category is comprised of entities potentially liable to Ohio citizens on the basis of interstate transactions or events forming part of a systematic and regular course of dealing with that jurisdiction or otherwise constituting the "minimum contacts" necessary for the attachment of personal jurisdiction.

In examining these categories, it is quickly apparent that while the literal language of the Ohio savings clause applies equally to all of them, any concern with the clause's potential burden on interstate commerce is necessarily confined to Category No. III. Category I is eliminated because it involves only Ohio's own intrastate commerce. Category II is eliminated because only those entities which are subject to Ohio jurisdiction need worry about protection from its statute of limitations.

Of particular importance, especially when examining the Ohio statute for some sign of discrimination against interstate commerce, is the lack of any basis in the present record for measuring or quantifying the membership of

the different categories or determining their relative importance, either in numbers or in economic effect. It would be the purest speculation, for example, to suppose that the segment of interstate commerce having the potential to be adversely affected by the savings clause is as large or larger than that segment which, by reason of due process considerations, is beyond the reach of the Ohio courts. There is likewise nothing in the present record to suggest that the Category I membership, made up of Ohio expatriates, former sojourners and unlocatable residents, is not as large or larger than either of the two remaining categories, or both of them combined.

It is also apparent that the Category III defendants, simply by making themselves vulnerable to lawsuits in the forum jurisdiction, have already accepted a larger burden on their interstate dealings than anything to be apprehended by reason of the Ohio savings clause. This Court in *World-Wide Volkswagen*, 444 U.S. at 297, and again in *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. at —, 94 L.Ed.2d at 103, clearly acknowledged that exposure to away-from-home lawsuits on the basis of the "minimum contacts" rule might discourage interstate commerce by prompting particular business firms to discontinue those activities which served to connect them with the forum state. This Court nevertheless recognized that whenever forum-state jurisdiction is warranted on the basis of legitimate state interests and compatible with due process, the affected companies must simply accept the resultant burden on their interstate activities as an appropriate cost of doing business. The relevant text reads as follows:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," Hanson v. Denckla, 357 US, at 253, 2 L Ed 2d 1283, 78 S Ct 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297; *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. at —, 94 L.Ed.2d at 103.

For purposes of the due process issues under consideration in the *World-Wide Volkswagen* and *Asahi* cases, it was thus considered sufficient that those business entities who were amenable to a state's long-arm jurisdiction knew what their exposure was and could protect themselves accordingly. The main point to be made here is that the class of business entities to whom those comments were addressed, *i.e.*, entities subject to forum-state jurisdiction on the basis of interstate activities, is exactly the same class of entities whose interstate activities were supposed by the courts below to be impermissibly burdened by denying them the protection of a statute of limitations. It must also be appreciated that the claims which might benefit from time extensions allowable under the savings clause are not new claims, but are part of the very same potential liability which the companies in question were expected to guard against by adjusting their price structures, procuring insurance or restricting their activities, all as noted in *World-Wide Volkswagen* and *Asahi*. The only alteration brought about by the Ohio savings clause is that such claims as might otherwise have been time-barred must now be defended on their merits, except to the extent

that they are also barred by the doctrine of laches. The incremental burden on interstate commerce thus resulting from the savings clause, while conceptually identifiable, seems certain to be virtually microscopic in relation to the burden already accruing from exposure to extraterritorial service.

Also adding to the complexity of proving a burden on commerce is the near impossibility of showing that individual late-filed claims—meaning claims that would have been untimely but for the beneficence of the savings clause—would not have been filed sooner if the additional time had not been provided. Midwesco's thus-far successful avoidance of the present claim proves nothing in this regard, since no future defendant will ever again be given the surprise advantage of a retroactive nullification of a presumptively valid statute, thereby altering the ground rules in the middle of the contest.

There would appear to be only a minuscule burden on commerce, therefore, even if the lower courts were correct in declaring (contrary to the position urged by Bendix in Part II *infra*) that under Ohio law, a foreign corporation can secure the protection of a statute of limitations only by procuring a license to do business in that State. Even as so interpreted, the Ohio statute would provide only a comparatively gentle inducement for obtaining a license, and would lack the coercive power of statutes of the type examined in cases such as *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921), making licensure a condition of doing interstate business within the state. Here, whatever cost savings may be achievable through appointment of an in-state agent would appear to be too

elusive and far too speculative to permit the argument that the savings clause, while merely permissive on its face, is coercive in its practical effect. Certainly there has not been the slightest demonstration that the statute has in fact induced any foreign corporations either to become licensed or to withdraw from Ohio-related interstate commerce.

In reaching their contrary conclusions in the decisions rendered below, the lower courts relied heavily on the decision of the New Jersey Supreme Court in *Coons I*, 94 N.J. at 316-18, 463 A.2d at 926-27, which by a four-to-three majority of its justices ruled that a similar New Jersey savings statute (the same statute which this Court upheld against due process/equal protection attack in the *Searle* case) was a *per se* violation of the Commerce Clause, being tantamount to forced licensure of the sort condemned in *Allenberg Cotton Co. v. Pittman*, *Dahnke-Walker Milling Co. v. Bondurant*, and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). The four-justice majority in *Coons I* concluded as follows:

> The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

94 N.J. at 318, 463 A.2d at 927.

Nothing Bendix might say in criticism of the New Jersey Supreme Court's reasoning in *Coons I* could demolish it as effectively as the opinion of Chief Justice Rehnquist

in the Honda dissent, culminating in his conclusion that "The impact on interstate commerce here is fairly negligible". *Honda Motor Co.*, 469 U.S. at 1126. Noting that the New Jersey court was purporting to rely on the precedents furnished by this Court in the *Allenberg Cotton* and *Sioux Remedy* cases, the Honda dissent distinguished those cases on the basis of the comparative severity of the sanctions at issue therein, which "totally barred foreign corporations from the state courts", in contrast to the New Jersey law's mere tolling of the statute of limitations. *Id.*, 469 U.S. at 1125. The Honda dissent also stressed the continued availability of the defense of laches as previously observed by this Court in *Searle*, 455 U.S. at 411 (Honda dissent, 469 U.S. at 1126).[4] The Honda dissent also included a reminder that the shelter of statutes of limitation "has never been a fundamental or natural right", noting that the proposition had been reaffirmed in *Searle* and elsewhere. *Id.*, at 1126.

The Honda dissent also faulted the New Jersey court because it "provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State." 469 U.S. at 1126. This criticism applies with equal force to the decisions of the lower courts in this proceeding.

This Court has previously demonstrated its awareness of recent scholarly commentaries on how the federal courts

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[4]The doctrine of laches, it should be noted, is fully operative in Ohio. See *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St. 3d 350, 352-53, 474 N.E.2d 295, 297-98 (1984); *Connin v. Bailey*, 15 Ohio St. 3d 34, 35, 474 N.E.2d 328, 329 (1984).

should conduct themselves in cases arising under the dormant Commerce Clause and why the balancing test of *Pike v. Bruce Church, Inc.* is not appropriate. One such commentary, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982), proposes "a radically diminished role for both the dormant commerce clause and the Court as its interpreter" (*id.* at 428) and would abandon the concepts of free trade and anti-protectionism as legitimate objectives of Commerce Clause enforcement. A more recent article was very favorably noticed by Justice Scalia in his concurring opinion in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —, 95 L.Ed.2d at 89, and argues for limiting judicial inquiry to the existence or nonexistence of a protectionist purpose. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). As earlier noted, no such purpose is to be found in the facts presented here.[5]

In any event, the *Pike* balancing starts by presuming the validity of the state statute, which "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Here the state interests are genuine and compelling, while the supposed

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[5]Likewise absent from the case *sub judice*, as previously noted, is any basis for concluding that the Ohio savings clause discriminates against interstate commerce or poses an impermissible risk of inconsistent regulation by different states, which presumably ends the matter under Justice Scalia's own recommended alternative to the balancing test as set out in the same concurring opinion.

burden on commerce is a largely theoretical construct, having no tactility or substance.

The finding of an impermissible burden on commerce, therefore, should be reversed.

II. BY EITHER OF TWO SEPARATE METHODS, MIDWESCO COULD HAVE APPOINTED AN OHIO AGENT FOR SERVICE WITHOUT SUBJECTING ITSELF TO OHIO JURISDICTION FOR ALL PURPOSES.

The lower courts' approach to the pertinent workings of the Ohio State Government was in stark contrast to this Court's handling of the identical issues in *Searle*. In *Searle*, as previously noted, the majority considered it inappropriate to decide the burden-on-commerce issue without authoritative information on the means available under New Jersey practice for avoiding the adverse consequences of the limitations tolling statute. Was it possible, this Court wanted to know, for a foreign corporation to satisfy the New Jersey tolling statute simply by appointing an agent "in some manner unexplained to us", and without obtaining a license to do business? *Id.*, 455 U.S. at 414. The case was accordingly remanded to ascertain the actual requirements of New Jersey law in this regard.

The District Court in this case, however, with only a motion for summary judgment before it and with no opportunity for resolving disputed factual issues, proceeded to final determination despite a strong showing that the alternative appointment procedures which this Court merely suspected might exist in New Jersey actually did exist in Ohio. The facts and circumstances in this regard

are set out below with specific reference to the two alternative methods for agency appointment which were available to Midwesco in its dealings with Bendix, and which will now be separately examined.

A. The appointment of an agent for service could have been included in the contract on which this action is based.

Because this was a contract claim and not a tort claim of the sort presented in this Court's *Searle* decision and New Jersey's *Coons* decisions, Bendix has consistently argued that Midwesco could have obviated whatever burden on commerce might otherwise have existed simply by appointing an agent for service in the contract itself. A unilateral declaration by Midwesco outside of the contract would presumably have had the same effect.

Midwesco has responded by correctly observing that no such appointment was actually made. All that this means, however, is that any ensuing burden on commerce resulted not from the savings clause, but from the failure to make the appointment.

The Court of Appeals below gave a different and more perplexing response, limited to the following sentence:

> While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause.

820 F.2d at 189.

While the Court of Appeals' meaning is not altogether clear, it may have been suggesting that in passing on the constitutionality of a statute, a court must consider how

it applies generally or in various circumstances, and not solely as it relates to the party raising the constitutional challenge. If such was intended, the Court of Appeals was plainly wrong, the correct rule having been declared by this Court in *County Court v. Allen*, 442 U.S. 140 (1979), subject to stated exceptions not applicable here:

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

442 U.S. at 154-55.

If, on the other hand, the Court of Appeals was conceding only the hypothetical existence of an appointment clause but denying its effectiveness, either in general or for purposes of the tolling statute, that too was error.

Rule 4.2(6) of the Ohio Rules of Civil Procedure identifies those persons who are authorized to receive process on behalf of a corporation. It permits service upon a domestic or foreign corporation by "serving the agent authorized by appointment or by law to receive service of process". On its face, this rule gives a corporation the choice of appointing an agent by simple non-statutory designation as part of a contract or otherwise, or by designating an agent in accordance with the provisions of the Ohio Foreign Corporations Law, Ohio Rev. Code § 1703.

The Ohio Rules of Civil Procedure were adopted in 1970 and are modeled on the Federal Rules. Cases interpreting the Federal Rules are often used by Ohio courts to explicate the Ohio rules. *E.g., Maryhew v. Yova*, 11 Ohio

St. 3d 154, 464 N.E.2d 538 (1984); *Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). Recently an Ohio appellate court relied on federal precedent to interpret Ohio Rule 4. *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344 (1983); *see* 1 Jacoby, *Ohio Civil Practice*, at 31. The federal analog of Ohio Rule 4.2(6) is Fed.R.Civ.P. 4(d)(3), which also permits process to be served on a corporation by serving an agent "authorized by appointment or by law" to receive process.

Under Fed.R.Civ.P. 4, there is no doubt that a corporation can appoint an agent to receive process as part of its business dealings with another party. *Kenny Construction Co. v. Allen*, 248 F.2d 656 (D.C. Cir. 1957); *National Acceptance Co. v. Wechsler*, 489 F. Supp. 642 (N.D. Ill. 1980); *Apex Pool Equipment Corp. v. Venetian Pools Inc.*, 52 F.R.D. 48 (S.D.N.Y. 1971); *Emerson Radio & Phonograph Corp. v. Callander Distributor Corp.*, 116 F. Supp. 926 (S.D.N.Y. 1953). The law in this regard was expressed as follows in 2 *Moore's Federal Practice*, ¶ 4.12:

> Appointment of an agent to receive service of process may be accomplished by contract, and it has been held that the parties to a contract may agree that a third person shall be the agent for receipt of process in actions arising out of the contract.

Id., at 4-139.

Furthermore, a contractual appointment of an agent for service will be recognized even if there has been no formal registration with the state. *Trueblood v. Grayson Shops*, 32 F.R.D. 190, 194 (E.D. Va. 1963). There is no basis for doubting, moreover, that whatever limits are imposed on the agent's authority will be respected by the courts. See *Osterling v. Commonwealth Trust Co.*, 35 F.

Supp. 704 (W.D. Pa.), *aff'd*, 155 F.2d 809 (3d Cir. 1940). *Compare with Kenny Construction Co. v. Allen*, 248 F.2d at 658 (service held to be within the agent's authority, the court adding, "it would have been simple and easy for [the defendant] to have said in the contract that the agent was appointed only for purposes of actions brought by the other party to the contract").

The language of the Ohio Rule and the cases interpreting the identical language of the Federal Rule make it clear that Midwesco, either by inserting an appropriate provision in its contract with Bendix or by simple notice to Bendix at any other time, could have appointed an agent to receive process in Ohio for any dispute that might have arisen between the parties. It would also appear to be immaterial for purposes of the Ohio tolling statute if the appointment in question was not co-extensive in operation and scope with the designation made as part of the qualification process, or that it differed from such a designation in that it was not part of a public record.

Such an appointment in this instance, therefore, need not have entailed any exposure by Midwesco to the general jurisdiction of the Ohio courts. It should also be emphasized that such an appointment would not have added to Midwesco's existing jurisdictional exposure even for the individual claim here asserted by Bendix: That claim was always enforceable through Ohio long-arm service, since Midwesco not only sold the boiler system but actually installed it on Bendix' Ohio premises.

Agency designation by contract, therefore, was not only available but would have completely obviated the alleged burden on commerce.

B. A properly tendered agency appointment would have been accepted for filing by the Ohio Secretary of State and treated as public notice.

The Court of Appeals below essentially disregarded the teaching of the *Searle* case and failed to recognize that if a means in fact existed for a foreign corporation to appoint an agent for service of process without becoming subject to the general jurisdiction of the State, the burden-on-commerce argument would almost certainly disappear.

There are concededly no statutes or published regulations specifically authorizing the public filing of agency appointments apart from the registration process. There is, however, a general provision authorizing the filing of miscellaneous documents which appears in the Ohio statutes as Ohio Rev. Code Ann. § 111.6 and reads in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

Both sides in the companion *Copley* case, apparently recognizing that a declaration from the Ohio Secretary of State's office would be the best evidence of the actual practices and official policies there in effect, sought and obtained written statements from the Corporations Counsel serving as a spokesperson for that office on the subject of the treatment to be given to such agency appointments as might be tendered for public filing. Since there was only a single combined hearing on the Commerce Clause issues in both *Copley* and the present case, Bendix

assumed that the letters received from the Secretary of State's office were part of a common record and so argued in the Court of Appeals when Midwesco sought to exclude them. While it appears that the Court of Appeals in fact considered these letters, it obviously gave little weight to their contents.

The first of these statements, a letter to counsel for defendant in the *Copley* case dated September 14, 1983, appears to deny the possibility of an agency designation by means of a public filing apart from the registration process. (J.A. 50.) A very different message, however, was subsequently supplied by the same spokesperson to counsel for the *Copley* plaintiffs by letter dated December 22, 1983. (J.A. 48-49.) That letter includes the following rather guarded message:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

Inconclusive as this letter may be on the subject of what "investigation" is required and who performs it, the letter at the very least confirmed that there were factual issues as to what residual burden might exist and what additional effort, if any, might be required of the designating party. Nevertheless, the Court of Appeals dismissed the entire subject of the referenced alternative filing procedure in the following single sentence:

> With regard to Bendix's suggestion that a corporation may merely notify the Secretary of State of its designated representative, we note simply that this argument is highly speculative and devoid of any statutory support.

820 F.2d at 189.

Part of the problem, therefore, was that the Court of Appeals seemingly regarded the alternative filing issue as a mere argument which Bendix failed to carry, instead of a factual issue as to which Midwesco, not Bendix, bore the full burden of proof. The issue was presented only because Midwesco had undertaken to prove the unconstitutionality of the tolling statute. It was obviously beyond the power of either party, moreover, to improve or clarify the Corporations Counsel's letter without examining representatives of that office, which would obviously have required an evidentiary hearing.

In declaring that the claimed alternative filing procedure was "devoid of any statutory support", the Court of Appeals appeared to be adopting the reasoning of the District Court in the *Copley* case. The decision in the latter case, in refusing to recognize any such procedure, commented in part as follows:

> Any scheme which would permit a corporation to engage solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature.

(J.A. 42.)

While a carefully drafted statute would no doubt have contributed clarity and certainty to official State policy on the matter at issue, it scarcely follows that the practices and policies actually in effect at the Secretary of State's office were irrelevant or lacked legal significance. One senses that the lower courts were influenced not by the difficulties of ascertaining State policy, but by their own

preferences as to how the policy should have been established.

While the Court in *Celotex Corp. v. Catrett*, 477 U.S. —, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. —, 91 L.Ed.2d 202 (1986), has unquestionably given increased impetus for the dismissal of actions via summary judgment, there is nothing in those decisions to justify the court's rejection of the December 22, 1983 letter from the Secretary of State's office or the refusal to recognize its import. The only decision consistent with the message contained in that letter would have been in favor of the position advocated by Bendix. To the extent that the letter was deemed incomplete or inconclusive, the court should have denied summary judgment and conducted an evidentiary hearing to resolve the issue.

III. THE OHIO TOLLING STATUTE, EVEN IF IT HAD BEEN UNCONSTITUTIONAL, SHOULD NOT HAVE BEEN INVALIDATED RETROACTIVELY

A key issue in deciding whether an unconstitutional statute should be invalidated retroactively, according to the ruling of this Court made in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), and reaffirmed in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982), is whether the ruling in question was "foreshadowed by earlier cases."

The earliest hint that there was even an issue of possible tension between the Commerce Clause and a tolling statute of the sort considered herein was this Court's *Searle* decision, rendered in 1982. The present lawsuit had already been commenced in December 1980.

The only cases involving tolling statutes which were available for the guidance of the District Court below, and which it in fact relied upon for its finding of unconstitutionality, were both 1983 decisions: *Coons I* and a case involving an Idaho tolling statute, *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983).

So far as is known, therefore, there was nothing to suggest to Bendix, at or near the expiration of the conventional four-year statute of limitations (probably on or about July 3, 1979), that it would be prudent not to rely on the tolling statute and to institute suit immediately.

The familiar three-part test for resolving questions of retroactivity was expressed as follows in this Court's *Northern Pipeline* decision:

> 1. [W]hether the holding in question decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases.
>
> 2. [W]hether retrospective operation of the holding will further or retard [the rule's] operation.
>
> 3. [W]hether retroactive application could produce substantial inequitable results.

Id., 458 U.S. at 88 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. at 106).

It seems apparent on the basis of these principles that decisions which serve to shorten a period of limitation for the commencement of a lawsuit are in most instances singularly inappropriate for retroactive application. See, *e.g.*, *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984); *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

It is assumed, therefore, that the only impediment to the achievement of a just and fair result in this regard is the Court of Appeals' refusal to consider the matter because the issue was raised only in Bendix' reply brief. 820 F.2d at 189.

Bendix must candidly acknowledge that it was forcefully made aware of the retroactivity issue by the New Jersey Supreme Court's ruling in *Coons II*, which was published in the Atlantic Reporter Advance Sheets on July 27, 1984. This was subsequent to Bendix' main brief to the Court of Appeals, which is dated July 16, 1984. In the *Coons II* decision, as previously noted, the New Jersey Supreme Court reconsidered its ruling in *Coons I* and changed it by making the decision prospective only, largely on the basis of this Court's *Chevron Oil* test and the reasonableness of the plaintiff's reliance on the prior law.

—o—

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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December 16, 1987

No. 87-367

In The

Supreme Court of the United States

October Term, 1987

BENDIX AUTOLITE CORPORATION,
Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether by denying the benefit of the statute of limitations to corporations which are not licensed to do business in Ohio, the Ohio tolling statute, Ohio Rev. Code § 2305.15, violates the Commerce Clause as applied to Midwesco Enterprises, Inc.

2. Whether the fact that the parties to the contract could have included a provision naming an agent to receive process, which in fact was not done, can avoid the Ohio tolling statute's unconstitutional burden on interstate commerce.

3. Whether the Court of Appeals correctly refused to entertain the argument that the ruling of unconstitutionality of the Ohio tolling statute should be given only prospective effect when such argument was raised for the first time in Bendix's reply brief and had never been raised in the District Court.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Bendix Autolite Corporation ("Bendix"), filed its action against Appellee Midwesco Enterprises, Inc.[1] ("Midwesco"), on December 19, 1980 in the United States District Court for the Northern District of Ohio. It sought to recover damages arising out of the sale and installation by Midwesco of a coal-fired boiler system. Bendix began beneficial use of the boiler system on July 3, 1975.

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[1] Midwesco Enterprises, Inc. is affiliated with Mid-Res, Inc. which is owned by Midwesco and Cofrath America Corp.

Midwesco moved for summary judgment on the ground that appellant's action was barred by Ohio's statute of limitations. The applicable Ohio statute of limitations require that both contract claims and fraud claims be brought within four years. Ohio Rev. Code §§ 1302.98, 2305.09(c). Midwesco first contended that Ohio's tolling statute, Ohio Rev. Code § 2305.15, was inapplicable inasmuch as Midwesco was continually subject to the long arm jurisdiction of the Ohio courts and hence was "present" in Ohio. Midwesco further contended that the tolling statute was unconstitutional as violating both the Commerce Clause of the Constitution and the Fourteenth Amendment thereto.

The District Court's decision issued on April 27, 1983 held that Midwesco was subject to the tolling statute based upon a finding that Midwesco, even though subject to Ohio's long-arm statute, was "out of state" for purposes of the tolling statute. (J.A. 12) In its decision, the District Court held in abeyance Midwesco's arguments that the tolling statute was unconstitutional and granted the parties the right to seek leave of court to participate in oral arguments in *Copley v. Heil-Quaker Corp.*, No. C 82-512. (J.A. 18) *Copley*, which also raised the question of the constitutionality of the tolling statute, had been filed in the same district court and was pending at the time before the same judge.

Bendix conceded that Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, maintained no corporate office or facility in Ohio and did not appoint an agent for service of process in Ohio.

On March 8, 1984, the District Court issued its decision in which it found that under Ohio law the only way that a foreign corporation such as Midwesco can appoint an agent for service of process within Ohio and thereby satisfy the tolling statute is by obtaining a license to do business in Ohio. (J.A. 20) The court thus held that the tolling statute violates the Commerce Clause and never reached Midwesco's additional argument that the tolling statute violates the Due Process Clause.

The District Court analyzed the tolling statute under both a *per se* test and a balancing test and held, under both standards, that it violates the Commerce Clause as applied to Midwesco. The court therefore granted Midwesco's motion for summary judgment inasmuch as the action was barred by the statute of limitations. Bendix never raised in the District Court the question of a contractual provision appointing an agent for service of process avoiding the effects of the tolling statute. Bendix also never raised in the District Court the question of the prospective application of the decision and the same was never considered by the court.

Bendix appealed the decision to the Court of Appeals which, in a decision reported at 820 F.2d 186, affirmed the District Court's decision granting Midwesco's motion for summary judgment. In so doing, the Court of Appeals agreed with the District Court and held that the only way a foreign corporation can satisfy the tolling statute is to obtain a license to do business in Ohio requiring the appointment of an agent for service of process, thus exposing the corporation to personal jurisdiction in the state courts. The Court of Appeals found this burden placed on foreign

corporations engaged in interstate commerce to be a *per se* violation of the Commerce Clause. The Court of Appeals considered, and found unpersuasive, Bendix's contention that the Court need not find the tolling statute unconstitutionally burdensome because foreign corporations can appoint an agent to receive process in Ohio without formally registering to do business in the state. Finally, the Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the District Court's ruling should be given only prospective effect.

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SUMMARY OF ARGUMENT

Midwesco, in Part I of its argument, establishes that the Ohio tolling statute is a forced licensure provision. In order for Midwesco to obtain a physical presence in Ohio to gain the benefits of the statute of limitations it must become licensed to transact business in Ohio requiring it to designate a statutory agent. By designating a statutory agent, Midwesco would submit itself to the general jurisdiction of the courts of Ohio for all purposes waiving its personal jurisdiction defenses and therefore its due process rights. This Court and other courts have long held such forced licensure provisions to impose an impermissible burden on interstate commerce. Midwesco sets forth several examples illustrating the pernicious effect of the statute upon interstate commerce. Midwesco also illustrates how the tolling statute discriminates against interstate commerce both by its language and its application. Even Bendix's argument proves this point. The minimum

contacts argument put forth by Bendix is shown to be baseless since the statute applies to all corporations engaged in interstate commerce. Furthermore once having appointed a statutory agent the question of minimum contacts is irrelevant since the corporation has submitted itself to the general jurisdiction of the Ohio courts. Even if the Court was to find that the statute applies evenhandedly, the burden on interstate commerce is not merely incidental and far outweighs any local benefits which could be served by a more narrowly drawn statute.

Midwesco demonstrates that even though the statute of limitations may be a privilege, Ohio may not impose upon it conditions requiring the relinquishment of Due Process rights—a waiver of personal jurisdiction. Furthermore, laches is proven not to be available as a defense to Midwesco under Ohio law, contrary to Bendix's assertion.

Part II evidences that under the Ohio statutory scheme, the sole means for a foreign corporation to designate an agent for service of process is by becoming licensed to transact business in Ohio. Since the parties did not include a provision appointing an agent in their contract the question as presented by Bendix is both speculative and waived. Additionally, such a provision would circumvent the Ohio statutory scheme and Midwesco could not be forced to agree to such a provision and waive its Due Process rights. Midwesco points out that the District Court in a companion case rejected Bendix's argument that the Ohio Secretary of State could simply have accepted a filing designating an agent. This argument was also rejected by the Court of Appeals in this case as well as the New Jersey Supreme Court under a similar statutory scheme. Even

the correspondence from the Ohio Secretary of State's office relied upon by Bendix fails to supports its position.

Part III argues that Bendix has waived the issue of the retroactive application of the District Court's deicision, having first raised it in its reply brief in the Court of Appeals. The District Court's decision should be applied retroactively since the holding of unconstitutionality was made in this very case and failure to do so would be contrary to this Court's decisions and would have a negative effect upon the legal profession.

———o———

ARGUMENT

I. THE TOLLING STATUTE IMPOSES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

The Ohio tolling statute is a forced licensure provision. Compliance with it would have compelled Midwesco, and any other foreign corporation, to submit to personal jurisdiction in Ohio for all purposes. It is this forced licensure which places an impermissible burden on interstate commerce which this Court, and others, have never hesitated to strike down. The District Court and the Court of Appeals correctly held this forced licensure provision to be unconstitutional.

As they have done throughout this litigation, Bendix argues that the issues in this cause were already decided by this court in *G.D. Searle & Co. v. Cohen*, 455 U.S. 404 (1982). That is simply untrue. This Court in *Searle* merely held that the New Jersey tolling statute did not violate the

equal protection clause.[2] Bendix ignores the fact that the New Jersey statute in *Searle* was "examined under the Equal Protection Clause." *Id.*, 455 U.S. at 410. This Court did ***not*** apply the Commerce Clause test in *Searle*, which is a much more stringent test than the Equal Protection test which was applied. Contrary to Bendix's contention, nothing in either of the lower courts' decisions herein is in any way contrary to the *Searle* decision.

Both of the courts below relied upon the New Jersey Supreme Court's decision in *Coons v. American Honda Motor Co.* (*"Coons I"*), 94 N.J. 307, 462 A.2d 921 (1983), which held New Jersey's tolling statute, N.J.S.A. 2A:14-22, unconstitutional as violative of the Commerce Clause. Ironically *Coons I* is the culmination of this Court's remand in *Searle*, which Bendix is so fond of citing. The New Jersey statutes which were at issue in *Coons I* are practically identical to their Ohio counterparts presently before this Court: N.J.S.A. 2A:14-22 and Ohio Rev. Code § 2305.15 ((the tolling statutes); N.J.S.A. 14A:4-1 and Ohio Rev. Code § 1703.041 (statutory agents for corporations); and New Jersey Rule 4:4-4(c)(1) and Ohio Civil Rule 4.2(6) (service upon corporations).

Citing this Court's decisions in *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974), *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), the *Coons I* court noted that a state cannot discriminate against a

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[2] This Court did not hold that the New Jersey tolling statute did not violate both the Equal Protection Clause and the Due Process Clause as Bendix incorrectly states in footnote 1 of its brief.

foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. The New Jersey Supreme Court recognized that there is no fundamental right to a statute of limitations defense but proceeded to hold:

> That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

Coons I, 463 A.2d at 927. The Court thus held that the New Jersey tolling statute was a forced licensure provision which must be stricken as a *per se* violation of the Commerce Clause. It further found that the tolling statute would violate the Commerce Clause under a balancing analysis. *Coons I*, 463 A.2d at 926, n. 7.

The lower courts also relied upon the decision in *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D.Ida. 1983), *affirmed in part, reversed in part*, 746 F. 2d 1486 (mem.unpub.) (9th Cir. 1984), involving Idaho Code § 30-509, a tolling statute. Under the Idaho statutory scheme, a foreign corporation doing business in Idaho was required to appoint an agent for process and thereby expose itself to personal jurisdiction in the state in order to obtain the benefit of the statute of limitations. The court found that the burden placed on foreign corporations "would clearly violate the Commerce Clause if the per se rule is employed" but declined to apply the rule based

upon its belief that § 30-509 only applied to firms doing business in Idaho and not to foreign corporations engaged exclusively in interstate commerce. *Id.*, 575 F.Supp. at 945. Applying the balancing test, the *McKinley* court found that by forcing foreign corporations to waive their personal jurisdiction defenses the statutory scheme placed a serious burden on interstate commerce. The court held that this burden on interstate commerce "was clearly excessive when compared to the benefits obtained by those statutes" and that any benefits to Idaho residents could be obtained through less onerous means. *Id.*, 575 F.Supp. at 948.

The Ninth Circuit's unpublished memorandum in *McKinley*, which is prohibited under Ninth Circuit Rule 21(c) from being cited as precedent within that Circuit, affirmed the District Court's decision dismissing the complaint as barred by the statute of limitations. The Court of Appeals, however, found that since § 30-509 did not apply where a foreign corporation could have been served with process under Idaho's long-arm statute and did not apply to corporations dealing exclusively in interstate commerce there was no waiver of personal jurisdiction. This is contrasted with the Ohio statutory scheme—which has been held to apply to a foreign corporation which could have ben served with process under Ohio's long-arm statute and to foreign corporations dealing in interstate commerce—which conditions the statute of limitations upon a waiver of personal jurisdiction defenses.[3]

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[3] This points out the anachronism in Ohio law arising from subsequent court interpretations of the Ohio Supreme Court's decision in *Seeley v. Expert, Inc.*, 26 Ohio St. 2d

(Continued on following page)

Bendix mischaracterizes the decisions of both the District Court and the Court of Appeals in stating that they failed to analyze the tolling statute either in its general application or in relation to the facts in this case. Both courts undertook an analysis of the tolling statute and came to the same conclusion—that it violated the Commerce Clause.

The District Court recognized that this Court has applied two tests in analyzing whether a state statute violates the Commerce Clause—a *per se* test and a balancing test. The District Court agreed with the analysis in *Coons I* and *McKinley* and held that regardless of whether the tolling statute was analyzed under a *per se* test or a balancing test, as applied to Midwesco it violated the Commerce Clause. The Court found that under a *per se* test the tolling statute violated the Commerce Clause "by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense." (J.A. 26) The Court further held that under the balancing test "the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce." (J.A. 26-27) Since the Court found that the tolling statute violates the Commerce Clause it did not decide Midwesco's argument that the tolling statute also violates the Due Process Clause.

The Court of Appeals agreed with the District Court that the reasoning of *Coons I* and *McKinley* should be applied to this case. It held that the tolling statute forced a foreign corporation to choose between exposing itself to personal jurisdiction in the state courts by complying with the tolling statute and remaining liable in perpetuity for all lawsuits containing state causes of action by refusing to comply with the tolling statute. The Court of Appeals found "this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause." 820 F.2d at 188.

Bendix spends numerous pages discussing what the tolling statute supposedly is not about, but never addresses the central question of what the statute is—a forced licensure provision.[4]

(Continued from previous page)

61, 269 N.E.2d 121 (1971). As a result of *Seeley*, Ohio may very well be the sole state which still holds that a foreign corporation engaged in interstate commerce which is subject to long-arm jurisdiction is not considered to be physically present in the state for purposes of the tolling statute. See, e.g., *Bancorp Leasing and Financial Corp. v. Agusta Aviation Corp.*, 813 F.2d 272, 274-275 (9th Cir. 1987) (containing a compendium of cases holding that a tolling provision does not apply where a foreign corporation is amenable to service under a long-arm statute.) But for this holding the present issues would be moot inasmuch as Midwesco would have received the protection of the statute of limitations and fallen outside the scope of the tolling statute since Midwesco was certainly present in Ohio for purposes of long-arm jurisdiction. (It supplied a boiler system in Ohio) In fact, this was the initial argument raised by Midwesco in support of summary judgment in the District Court which was rejected. It is also quite possible that the Supreme Court of Ohio, if faced with this question, would hold that Midwesco was "present" in the state. But the District Court was required to follow *Seeley* and its progeny.

[4] While the tolling statute might have some salutary purposes such as tolling the statute of limitations as to those who have absconded from the state, as applied to foreign corporations engaged in interstate commerce, these purposes are non-existent.

This Court has held forced licensing provisions to be *per se* violations of the Commerce Clause in broadly worded opinions. Justice Potter, in his opinion concurring in part and dissenting in part in *Searle* in which Chief Justice Berger joined, found that the Commerce Clause challenge has considerable force citing *Allenberg Cotton Co. v. Pittman. Searle*, 455 U.S. at 419-420. In *Allenberg Cotton Co.* this Court held that even though plaintiff was doing business in the State of Mississippi its contacts with the state were interstate in character so the state could not require plaintiff to become licensed to do business as a prerequisite to using its courts. This Court in *Dahnke-Walker v. Bondurant*, 257 U.S. at 291, in holding a statute unconstitutional which rendered a contract made by a foreign corporation unenforceable because of the corporation's failure to become licensed to transact business, stated:

> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.

An analougous statutory scheme faced this Court in *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). The statute required that in order to maintain a suit in the courts of the state one must become licensed to transact business in the state, must appoint a resident agent upon whom process may be served in any action to which it may be a party and must pay the filing and recording fee. As far back as 1914 this Court found that the requirement of appointing a resident agent for service of process is particularly burdensome since it required the corporation to

subject itself to the jurisdiction of the courts of the state in general:

> The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance *until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce.* As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause.

Id., 235 U.S. at 205. (Emphasis added)

A similar statutory scheme also faced this Court in *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), in which this Court found that the statute imposed a condition upon a foreign corporation seeking to do business in the state and as such was "a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce." *Id.*, 217 U.S. at 111.

This is exactly the same effect that the tolling statute presently before this Court has—it requires Midwesco to subject itself to the general jurisdiction of the courts of the State of Ohio in order to avoid its application. As the District Court correctly pointed out, by appointing a statu-

tory agent pursuant to Ohio Rev. Code § 1703.041, Midwesco would waive any future defenses of lack of personal jurisdiction[5]. This is because the courts of Ohio are courts of general jurisdiction and personal service upon Midwesco's Ohio statutory agent would give the court jurisdiction over all transitory causes of action. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393 (1931); *Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 OhioApp. 116, 197 N.E.2d 379 (1963).

A simple example demonstrates the pernicious effect upon Midwesco. One of Midwesco's divisions is a preinsulated pipe company. Pipe fitters and welders travel throughout the country to install Midwesco's pipe. If a pipe fitter or welder who fortuitously happens to be an Ohio resident is injured on a Midwesco project in Florida he could then file suit against Midwesco in Ohio since Midwesco would have designated a statutory agent for service of process and thereby subjected itself to suit in Ohio for *all purposes*, even though it has no offices, nor does it do business in Ohio generally. Examples such as this abound —we live in a highly transient society with corporations

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[5] Under the Ohio Foreign Corporation Act, Ohio Rev. Code § 1703.02, Midwesco, as a corporation engaged in Ohio solely in interstate commerce would not normally have to appoint a statutory agent under § 1703.041 in order to transact business in Ohio. Section 1703.02 specifically excludes from the coverage of § 1703.041 corporations installing machinery or equipment sold by them in interstate commerce. Section 1703.02 does *not*, however, exclude the application of the tolling statute to corporations engaged solely in interstate commerce like Midwesco.

and individuals continually doing business interstate and internationally. The evils and burdens of forced licensure —recognized by this Court as long ago as 1914—increases immensely with this burgeoning of commerce.

Bendix prefers to ignore the foregoing cases except to reiterate Chief Justice Rehnquist's dissent from this Court's denial of certiorari from the decisions of the New Jersey Supreme Court in the *Coons* litigation. *Honda Motor Company, Ltd. v. Coons*, 469 U.S. 1123 (1985). At bar, the tolling statute's impact on interstate commerce is not "fairly negligible." To the contrary, the impact can be quite great as exemplified by the fact that this issue is presently before the Court in two separate matters. *See also, Copley v. Heil-Quaker Corp.*, Supreme Court No. 87-170. Moreover, as demonstrated, forcing foreign corporations to remain liable in perpetuity unless they become licensed to do business in the State of Ohio and appoint a statutory agent for service of process is certainly not a negligible impact. Myriad of examples can be cited as to the practical effect on commerce. Would bonding companies issue bonds on construction projects such as these if their principal, and therefore they themselves, remained liable in perpetuity? Likewise, contractors, architects, engineers, etc., would not want to undertake a project in a foreign state if they are subject to jurisdiction for all purposes. Principals and bond companies would be forced to defend lawsuits throughout the country in forums which may have no relationship with the particular project in question or the principal's place of business.

This Court's decisions in the forced licensure cases are not so narrowly worded as Bendix perceives. The de-

cisions, as noted above, do not turn solely upon the fact that failure to become licensed barred the corporations from the state courts. The holdings are much broader than that and clearly emcompass the factual situation with which this Court is presently faced.

Bendix also refers to the supposed availability of the defense of laches. As correctly pointed out by Justice Stevens in his dissent in *Searle*, "there are material differences between laches—which requires the defendant to prove inexcusable delay and prejudice—and the bar of limitations, which requires no such proof." *Searle*, 455 U.S. at 420-421. Additionally, in Ohio laches is available only in equitable actions and only where the action is not governed by a statute of limitations. *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817, 822 (6th Cir. 1981); *Woodrum v. Abbott Linen Supply Co.*, 428 F.Supp. 860, 862 (S.D.Ohio, 1977). Since the present cause is an action at law which is governed by its own statute of limitations laches would not be available to Midwesco in Ohio.

Bendix also points out that the protection of statutes of limitations is not a fundamental or natural right. But Midwesco has never claimed that it is. Additionally, such a determination is unnecessary in order to find a violation of the Commerce Clause. All that is required is that the tolling statute discriminates against foreign corporations engaged in interstate commerce by conditioning the coverage of the statute of limitations upon their becoming licensed to transact business in Ohio. It has long been established by this Court that a state may not impose, even upon a privilege, conditions requiring the relinquishment of a

constitutional right. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657-658 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963); *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 577, 593-594 (1926); *Terral v. Burke Construction Co.*, 257 U.S. 529, 532 (1922). Here, Ohio seeks to condition the protection of the statute of limitations upon Midwesco's relinquishing its Due Process rights —a waiver of personal jurisdiction. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), cited by Bendix, is inapposite. This Court in *Chase* merely held that the lifting of a statute of limitations restoring a remedy lost through the passage of time is not a *per se* violation of the Fourteenth Amendment. It did not hold that a state may condition the statute of limitations so as to discriminate against and unduly burden interstate commerce.

Without any support, Bendix makes the bold statement that the tolling statute does not discriminate against interstate commerce. (Bendix brief, p. 9) This flies in the face of the language of the statute. *Only foreign corporations* engaged in interstate commerce are required to appoint a statutory agent by becoming licensed to transact business in order to avoid the tolling of the statute of limitations. Only by ignoring both the language and application of the tolling statute can Bendix conclude that it is nondiscriminatory and regulates evenhandedly.

Dealing in pure speculation, Bendix argues that a significant and presumably sizeable portion of interstate commerce is unaffected by the tolling statute. Presumably this consists of foreign corporations engaged in interstate commerce who are beyond the reach of the Ohio courts due

to a lack of minimum contacts. (Bendix brief, p. 12-13) But Bendix's minimum contacts argument is irrelevant because it overlooks a key fact—that the tolling statute applies to *all* foreign corporations engaged in interstate commerce regardless of whether or not they have the necessary minimum contacts with Ohio. The tolling statute by its language applies to all unlicensed foreign corporations inasmuch as it only exempts those corporations which can be personally served with process in Ohio. Nothing in the tolling statute exempts foreign corporations which lack the necessary minimum contacts. It requires all foreign corporations—even those lacking minimum contacts—to become licensed to do business and thus waives their personal jurisdiction defenses as a condition to obtaining the benefit of the statute of limitations. Foreign corporations engaged in interstate commerce which lack minimum contacts, by appointing a statutory agent for process, waive personal jurisdiction. Justice Powell noted this in his opinion in *Searle*. *Searle*, 455 U.S. at 419, n. 5. By once having appointed an agent pursuant to Ohio Rev. Code § 1703.041 there is no longer a concern with minimum contacts since the corporations will have submitted themselves to the general jurisdiction of the courts of Ohio. *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 175 (1939); *Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93, 95 (1917).

Bendix's argument presupposes that foreign corporations engaged in interstate commerce are going to inherently know whether or not they have met the necessary minimum intrastate contacts to establish jurisdiction in Ohio. That is something which the Ohio courts can only determine on a case-by-case basis. Long before this issue

would be decided by the courts, foreign corporations engaged in interstate commerce will have been faced with the choice of waiving personal jurisdiction or remaining liable in perpetuity on state causes of action.

Based upon this fallacy, Bendix proceeds to categorize the parties allegedly affected by the tolling statute. It is indeed ironic that Bendix, by its own erroneous breakdown of those affected by the tolling statute, demonstrates that the statute discriminates against interstate commerce. Bendix's category I consists of intrastate actors not servable in Ohio which according to Bendix includes Ohio corporations and domesticated foreign corporations which have abandoned intrastate activities. However, Ohio corporations and domesticated foreign corporations, as a prerequisite of doing business in Ohio, had already designated agents in Ohio for purposes of process. Bendix even concedes that this category only involves intrastate commerce.

As already illustrated, the tolling statute does not distinguish between Bendix's categories No. II (interstate actors beyond the reach of the Ohio courts on Due Process grounds) and No. III (interstate actors subject to Ohio's long-arm jurisdiction). Bendix admits that category No. III is affected by the unconstitutional burden on interstate commerce. But since the tolling statute does not distinguish between categories No. II and No. III both categories are unconstitutionally burdened. As Bendix concedes, since category No. I consists of intrastate actors its members are untouched by the pernicious effect of being forced to become licensed in Ohio and designate a statutory agent. What is clear is that it is *only* foreign corporations engaged in interstate commerce who are discriminated

against by being forced to become licensed to transact business in the State of Ohio to gain the benefits of the statute of limitations. The tolling statute thus discriminates against foreign corporations engaged in interstate commerce and does not regulate evenhandedly.

Bendix next makes the untrue contention that foreign corporations engaged in interstate commerce subject to Ohio long-arm jurisdiction have accepted a larger burden on their intrastate dealings than anything resulting from the tolling statute. A foreign corporation engaged solely in interstate commerce which subjects itself to the long-arm jurisdiction of Ohio does so *only* in connection with that particular matter arising in Ohio by which it established such jurisdiction. Compare that with the effect of the tolling statute which requires the foreign corporation to become licensed in Ohio. In order to become so licensed the corporation must maintain a statutory agent, Ohio Rev. Code § 1703.041, which subjects the corporation to the general jurisdiction of the courts of Ohio for any and all matters over which the courts have jurisdiction. This would include claims against Midwesco which are unrelated to Ohio. The Due Process Clause would normally prohibit any such attempted claim of jurisdiction by the courts of Ohio. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The tolling statute, by conditioning the benefits of the statute of limitations upon the appointment of a statutory agent within Ohio thus forces Midwesco to surrender its Due Process rights.

Should this Court for some reason find the tolling statute to regulate evenhandedly, it is still unconstitutional inasmuch as the effects on interstate commerce are not merely incidental and far outweigh the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Despite the fact that nowhere in its brief does it discuss the alleged state interests, Bendix jumps to the conclusion that those unstated interests are genuine and compelling. (Bendix brief, p. 21) Bendix's means of dealing with this issue is to merely argue that valid state interests have been conclusively established in the *Searle* opinion. But the *Searle* case was an equal protection case. No matter how much Bendix attempts to ignore this distinction, the test applied under an equal protection argument where there is no invidious classification or fundamental right is simply whether the statute is rationally related to the achievement of legitimate governmental ends. Such a test is much less stringent than the balancing test applied on a Commerce Clause question. The *Coons I* court recognized that *Searle* applied "the less rigorous equal protection standard." *Coons I*, 463 A.2d at 926. The *Searle* court merely found that "rational reasons support tolling the limitation period for unrepresented foreign corporations." *Searle*, 455 U.S. at 410. There was no balancing by this Court in *Searle* of the burden imposed on interstate commerce as against the local benefits.

As confirmed by Bendix in its brief, the sole local interest protected by the tolling statute is the alleged ease with which a plaintiff can sue a defendant present within the state as contrasted with one subject to Ohio's long-arm jurisdiction. Bendix, however, knew Midwesco's address at all relevant times. There was never a claim by Bendix that it was unable to locate or serve Midwesco under the Ohio long-arm Statute. It should also be noted that service

of process under the long-arm provision is no more difficult than obtaining service within the State of Ohio since Ohio Civil Rule 4.3(B) specifically provides for service by certified mail and sets out a simple and definite procedure for obtaining such service.

Compare this with the burden that the tolling statute places upon Midwesco. In order for Midwesco to become licensed to transact business it must appoint a statutory agent. As already established, by doing so Midwesco subjects itself to the general jurisdiction of the courts of Ohio for all transitory causes of action and waives its Due Process rights.

The tolling statute's burden on interstate commerce is further accentuated by the fact that it postpones the running of the statute of limitations in perpetuity. The tolling statute does not toll the running of the statute of limitations solely during the period in which a plaintiff could not reasonably have located and served the foreign corporation, but rather tolls it for decades. Whatever limited local interest may be served by the tolling statute with respect to parties evading service could easily be accomplished by a more narrowly drawn statute.

This matter arises solely as a result of anachronistic interpretations of the tolling statute following *Seeley* in which Ohio courts have held that being subject to long-arm jurisdiction in Ohio does not constitute physical presence in the state for purposes of the tolling statute. (If they did so hold, Midwesco would have had the benefit of the statute of limitations.) As a result of this anachronism, Bendix urges this Court to embrace a pernicious doctrine—one that would turn back the clock on a long line of cases

holding that forced licensure provisions such as this are unconstitutional violations of the Commerce Clause and that a statute cannot condition a privilege upon the relinquishment of a constitutional right. By accepting Bendix's position this Court would sanction, and indeed encourage, states to pass specific legislation to accomplish directly that which the tolling statute does indirectly—conditioning the benefit of the statute of limitations to foreign corporations engaged in interstate commerce upon becoming licensed to transact business in the state. Such legislation would seriously damage the way foreign corporations transact business. If they elected to engage in interstate commerce in such states they would be faced with the dilemma of choosing between being liable in perpetuity for all state causes of action or relinquishing their Due Process rights. Nothing presented by Bendix justifies such a result, nor reversing the lower courts' holdings that the tolling statute is unconstitutional.

II. MIDWESCO COULD NOT HAVE APPOINTED AN AGENT FOR SERVICE OF PROCESS WITHOUT SUBJECTING ITSELF TO THE GENERAL JURISDICTION OF THE COURTS OF THE STATE OF OHIO.

Bendix again attempts to contrast the decision of the lower courts herein with the *Searle* decision by mischaracterizing *Searle*. Bendix contends that the majority in *Searle* considered it inappropriate to decide the issue of the burden on commerce without authoritative information on the means available under New Jersey law for avoiding the adverse consequences of the statute. Bendix prefers to ignore the fact that this Court remanded *Searle* for, among other reasons, a determination whether under

New Jersey law a foreign corporation could avoid the tolling statute without having to become licensed to do business in the state solely because of what was perceived as an ambiguity in a footnote in the New Jersey Supreme Court's decision in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In so doing, Bendix quotes *Searle* totally out of context on Page 22 of its brief —the quote is from the Court's statement of the respondent's position and did not represent the Court's position.

No such ambiguity exists in Ohio law as this Court in *Searle* felt existed in New Jersey. Furthermore, the District Court herein had the additional advantage of the New Jersey Supreme Court's decision in *Coons I* and, contrary to Bendix's contention, did review Ohio law on this question. The District Court's decision proves that, despite Bendix's unsupported assertion, Bendix did not make a strong showing that alternative appointment procedures existed in Ohio.

A. THE APPOINTMENT OF AN AGENT FOR PROCESS WITHIN THE CONTRACT WOULD HAVE BEEN VIOLATIVE OF THE STATUTORY SCHEME.

Bendix claims that Midwesco could have obviated the burden on interstate commerce by appointing an agent for service in the contract between the parties. It must be pointed out that this specific issue was never raised by Bendix in the District Court and was therefore waived.

As Bendix correctly points out, this argument was raised before the Court of Appeals (albeit for the first time) and rejected by it as follows:

> While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause.

820 F.2d at 189. There is nothing perplexing in this statement as Bendix suggests. The Court of Appeals merely recognized the fact that Bendix and Midwesco did not include such a provision in their contract and the Court would therefore not decide a speculative issue. There being no such provision in the contract the Court of Appeals still had to analyze the question of whether the tolling statute violated the Commerce Clause within the statutory scheme. Bendix's self-serving speculation as to what the Court of Appeals meant by the aforesaid statement is baseless and without any foundation in the opinion itself.

Bendix attempts to distinguish the present cause from both *Searle* and *Coons I* on the basis that they were tort claims and this is a contract claim. In fact, any such distinction is irrelevant as evidenced by the fact that this same issue was dealt with by Justice Potter's opinion in *Searle* and was fully addressed in *Coons I*.

The question in *Coons I* was raised in the context of New Jersey Rule 4:4-4(c)(1) which is the relevant rule regarding service upon a corporation in New Jersey and which is practically identical to Ohio Civil Rule 4.2(6). Analyzing the question within the statutory scheme, the New Jersey Supreme Court held that a foreign corporation could not merely appoint an agent for service of process in New Jersey rather than registering to do business there. In so holding, the Court also found that the New Jersey Rule did not provide an independent basis for the designation of an agent to accept service but merely di-

rected service on a person so designated. *Coons I*, 463 A.2d at 924.

Justice Powell, in his opinion in *Searle*, also reviewed the issue within the context of the statutory scheme. Upon reviewing the New Jersey statutes he concluded "that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." *Searle*, 455 U.S. at 419. Justice Powell reached this conclusion despite New Jersey Rule 4:4-4(c)(1) which has identical language to Ohio Civil Rule 4.2(6). The reason for this is that "statutory authority is necessary" to authorize the appointment by a corporation of an agent for service. *Id.* at 418. Similarly, under Ohio's statutory scheme the only way that a foreign corporation can designate an agent for process is by becoming licensed to transact business in Ohio. Ohio Rev. Code § 1703.041.

Just as in *Coons I* and even *Searle*, the present matter must be viewed within the Ohio statutory scheme. In order to be personally served in Ohio to satisfy the tolling statute, Midwesco, as a corporation, would have to maintain a place of business in Ohio, station an officer or managing or general agent in Ohio, or appoint an agent in Ohio for service of process. Ohio Civil Rule 4.2(6). Midwesco, as an Illinois corporation engaged in interstate commerce, could not, under the Commerce Clause, be required to move to, or maintain a place of business in Ohio. Similarly, Ohio could not require Midwesco to station an officer or managing or general agent in Ohio. Such conditions upon Midwesco's engaging in interstate commerce in Ohio would be a *per se* violation of the Commerce Clause. Bendix has recognized this fact throughout the litigation and does not dispute it.

What remains is the appointment of an agent to receive service of process. Ohio Civil Rule 4.2(6) is not an enabling statute setting forth an independent basis for the appointment of an agent, even though Bendix interprets it as such. Ohio Civil Rule 4.2(6) merely directs service on those indixiduals designated therein. Under Ohio law, the *sole* statutory provision by which a foreign corporation can appoint an agent in Ohio for service of process is Ohio Rev. Code § 1703.041 which is part of the procedure whereby a foreign corporation becomes licensed to transact business in Ohio. But requiring Midwesco to take out a license to do business in order to engage in interstate transactions in Ohio also constitutes a *per se* violation of the Commerce Clause.

Bendix cites absolutely no statutory support for its contention that the parties could merely have contractually designated an agent. Additionally, this flies in the face of Ohio Rev. Code § 1703.041. Bendix's contention would permit a foreign corporation to easily circumvent § 1703.041 by establishing a presence through the designated agent without becoming licensed to do business. This is totally contrary to the Ohio Foreign Corporations Act which requires a foreign corporation, in order to have a presence in the state as required by the tolling statute, to become licensed to transact business including the designation of a statutory agent under § 1703.041. In fact, this is even recognized by the opinion of Patricia Mell of the Ohio Secretary of State's office which Bendix improperly relies upon:

> Before a foreign corporation can establish a presence in Ohio, it must apply for a license and concurrently designate an agent. The designation of an agent with-

> out a license would, on its face, be an attempt by the corporation to acquire a presence in Ohio without the attendant formality of licensure.

(J.A. 49)

As Bendix itself concedes, the contract between Bendix and Midwesco did not include a provision appointing an agent for process. As such, Bendix's entire argument is speculative and therefore improperly raised. It should be noted that throughout its brief Bendix argues conjecture as an appropriate basis upon which to dismiss the lower courts' decisions. Despite the existence of identical statutory language in New Jersey, there is no support for Bendix's position in either *Searle* or *Coons I* inasmuch as there was no such contractual provision in existence in either of those cases. Additionally, such a provision in a contract would be for Bendix's benefit and therefore should have been included at its behest. Having failed at the appropriate time to seek to have such a provision included in its contract, Bendix now seeks improperly to have this Court reform the contract in order to gain the benefit of its own failings. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146, 150 (1978).

The inclusion of such a provision in the contract would have caused Midwesco to waive its Due Process rights. While a person can waive his constitutional rights, he cannot be forced to enter into a provision waiving those rights. *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N.E. 917, 919 (1911). But that is exactly what Bendix proposes—that Midwesco be punished because it did not accede to such a provision in its agreement with Bendix waiving its Due Process rights. The parties, however, did

not include such a provision in their contract indicating that no such rights were being waived. Midwesco, not having waived any of its constitutional rights, has been seeking the protection of those rights throughout this litigation. If foreign corporations engaged in interstate commerce were forced to contractually designate an agent for process as Bendix proposes, they would waive their personal jurisdiction defenses and Due Process rights. Bendix's argument would merely provide it with a way of circumventing the tolling statute which has been held unconstitutional, because it would have the same ultimate effect as the statute.

Bendix cites Ohio Civil Rule 4.2(6) as the basis for its belief that Midwesco need only have contractually designated an agent instead of having complied with the provisions of the Ohio Foreign Corporations Act. However, Bendix cites no statutory provisions and no cases supporting its contention. Instead, it argues that the Federal Rules of Civil Procedure are often used by Ohio courts to explain the Ohio Rules of Civil Procedure and in support thereof cites several cases, none of which involve the statutory provision in question. *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984), involved the presentation and waiver of affirmative defenses under Ohio Civil Rule 12. At issue in *City of Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984) was the application of notice pleading under Ohio Civil Rule 8. Bendix also incorrectly cites *Fancher v. Fancher*, 8 OhioApp.3d 79, 455 N.E.2d 1344 (1982). Contrary to Bendix's statement, nowhere in *Fancher* does the court rely upon federal precedent to interpret Ohio Civil Rule 4. The only time that the court cites any fed-

eral precedent is in conjunction with a discussion of notice pleading under Ohio Civil Rule 8.

None of the cases cited by Bendix for the proposition that under Federal Rule of Civil Procedure 4 a corporation can appoint an agent to receive process in fact stands for that proposition. None of Bendix's cases hold that Federal Rule 4 provides an independent basis for the designation of an agent to receive service of process. In fact, three of the cases cited by Bendix in support of its proposition nowhere even mention Federal Rule 4—*Kenny Construction Co. v. Allen*, 248 F.2d 656 (D.C.Cir. 1957); *National Acceptance Co. of America v. Wechsler*, 489 F.Supp. 642 (N.D.Ill. 1980); and *Emerson Radio & Phonograph Corp. v. Callander Distributing Corp.*, 116 F.Supp. 926 (S.D.N.Y. 1953). The fourth case cited by Bendix, *Apex Pool Equipment Corp. v. Venetian Pools, Inc.*, 52 F.R.D. 48 (S.D.N.Y. 1971), merely discusses the fact that the *individual* defendants designated an authorized agent who could be served under Federal Rule 4. In contrast to this is the New Jersey Supreme Court's decision in *Coons I*. There, when faced with the identical statutory scheme, the court held that a foreign corporation could not merely designate an agent as Bendix suggests.

Bendix also misrepresents the holding of *Trueblood v. Grayson Shops of Tennessee, Inc.*, 32 F.R.D. 190 (E.D. Va. 1963). The court in *Trueblood* merely stated that a fully empowered and authorized agent of the defendant could designate a person as agent upon whom service of process could be effectuated even before that person was appointed a registered agent of the defendant. The case has no relevance to any of the issues before this Court.

B. AN AGENCY APPOINTMENT WOULD NOT HAVE BEEN ACCEPTED FOR FILING BY THE OHIO SECRETARY OF STATE.

Once again Bendix misinterprets *Searle* by arguing that the Court of Appeals disregarded the teaching of *Searle*. That which Bendix contends is the teaching of *Searle* is simply not. The Court of Appeals confronted this argument and rejected it. The District Court could not confront the argument since it was never raised by Bendix although it was raised by plaintiffs in the case of *Copley v. Heil-Quaker Corp., supra.*

In its futile attempt to find support for its position Bendix turns to Ohio Rev. Code § 111.6 which simply provides that the Secretary of State shall charge and collect a $5.00 fee for filing any certificate or paper not required to be filed. Bendix contends that this section authorizes a corporation to file with the Ohio Secretary of State notice designating an agent to accept service of process without registering to do business. This is incorrect and without any basis at all.

Bendix fails to point out that this issue was raised and rejected in *Coons I*. There, plaintiffs relied upon N.J.S.A. 14A:1-6(4) which provides that the Secretary of State shall record all documents which relate to corporations and which are required or permitted to be filed in his office. The court in *Coons I* noted that the New Jersey Secretary of State "has acceded to the Attorney General's contrary position that in accordance with N.J.S.A. 14A:1-6(4) and N.J.S.A. 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of

process." *Coons I*, 463 A.2d at 925.[6] The court in *Coons I* rejected the position of the New Jersey Secretary of State and the New Jersey Attorney General and held that inasmuch as no statute or rule "authorizes the designation of an agent without registering to do business in the state, we conclude that a foreign corporation cannot file with the Secretary of State notice designating a representative as its agent to accept service of process under N.J.S.A. 14A:1-6(4)." *Id.*, 463 A.2d at 925.

Bendix next refers to correspondence received by counsel in the *Copley v. Heil-Quaker Corp.* case from the Ohio Secretary of State's office. As Bendix concedes, these letters were never filed in this case and never became part of the record in this case.[7] There was no common record in the two cases as alluded to by Bendix. All that occurred was that arguments were heard during a single hearing but the arguments in the respective cases were not commingled as the District Court first heard the arguments of counsel in *Copley* followed by counsels' arguments in the instant cause.

Bendix's concession that Patricia Mell's December 22, 1983 letter is "inconclusive" is an understatement. Ms.

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6 This represented a deviation from the New Jersey Secretary of State's position at the time of *Searle* inasmuch as the *Searle* record included an opinion from the Secretary of State that the registration statute was the only means of designating an agent for service of process.

7 These letters, even though placed in the joint appendix by Bendix, not having been presented to the District Court and not being part of the records on appeal cannot be considered by this Court. *United States v. Dreike*, 707 F.2d 978, 983 (8th Cir. 1983); *Petitions of Rudder*, 159 F.2d 695 (2nd Cir. 1947).

Mell states in no uncertain terms that the Secretary of State would *not* in the ordinary course of business accept a designation of an agent from a foreign unlicensed corporation. The letter then opined that under the Ohio corporations law there was nothing either prohibiting or requiring the Secretary of State to accept such a designation if a "thorough investigation" established that the unlicensed foreign corporation was strictly interstate in nature. (J.A. 48) Nowhere does her letter even state how such an investigation might be carried out. The letter did not even state whether or not the Secretary of State would accept such a designation following such an investigation. (J.A. 49)

Bendix conveniently ignores the fact that this issue was considered and dealt with in length by the District Court in *Copley*, which was the only one of the two cases in which it was actually raised. Judge Potter thoroughly rejected Bendix's argument in *Copley:*

> The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mell, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation might

accept the designation of an agent from a corporation which is not registered to do business in Ohio.

(J.A. 42)

The District Court in *Copley* also noted that the Secretary of State's opinion had changed during the course of the litigation, citing Patricia Mells' letter dated September 14, 1983 in which she stated that, "Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State." (J.A. 43)

The Court of Appeals in the instant cause, faced with the same issue, concurred with the reasoning of the District Court in *Copley* and stated that "this argument is highly speculative and devoid of any statutory support." 820 F.2d at 189.

Bendix wrongly states that the Court of Appeals incorrectly viewed the burden of proof by placing the same upon Bendix with respect to the applicability of Ohio Rev. Code § 111.6. Contrary to Bendix's contention, the burden was upon it to establish that the statute in fact is an enabling statute as it contends. Furthermore, this Court has long established that once discrimination against commerce is demonstrated the burden falls on the party defending the validity of the statute "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353 (1977).

The tenuousness of Bendix's argument is demonstrated by its attempt on Page 29 of its brief to rewrite the opinions of both the District Court and the Court of Appeals. Contrary to Bendix's assertion, Patricia Mell's December 22, 1983 letter does not state the practices and policies actually in effect at the Secretary of State's office but rather consists of speculation as evidenced by the wording of the letter and as correctly found by both the District Court in *Copley* and the Court of Appeals herein. Furthermore, as exemplified by the New Jersey Supreme Court's decision in *Coons I*, the courts are in no way bound by such opinions of the Secretary of State's office. Bendix's sheer speculation as to what influenced the District Court and the Court of Appeals is so devoid of any factual basis as to not even justify a response.

III. THE DISTRICT COURT CORRECTLY APPLIED ITS DECISION RETROACTIVELY.

Bendix, obviously cognizant of the fact that it has no justifiable response to its failure to raise the issue of retroactivity either before the District Court or in its opening brief in the Court of Appeals, tries to make short shrift of it on the final page of its brief. Bendix prefers to ignore the issue and seeks to have the Court overlook a major transgression by Bendix in raising the issue for the first time in its reply brief in the Court of Appeals—it was never even mentioned in the District Court. This is not the only impediment to the prospective application of the District Court's decision, as Bendix contends, but it certainly is the first impediment and one which Bendix cannot overcome.

The Court of Appeals, faced with the issue of the retroactivity of the ruling, refused to consider it as a result of the fact that it was raised by Bendix for the first time in its reply brief. 820 F.2d at 189. In so doing, the Court cited *Thompson v. Commissioner of Internal Revenue*, 631 F.2d 642, 649 (9th Cir. 1980). The Court's decision is based upon a long established rule for which the number of supporting citations are legion.[8]

Furthermore, the decision holding that the tolling statute is an unconstitutional violation of the Commerce Clause was issued by the District Court in this very case. The District Court's ruling must be applied in this case to avoid the bar against constitutional adjudications standing as mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Valdez v. Perini*, 474 F.2d 19, 21 (6th Cir. 1973). None of the cases cited by Bendix involves a holding of unconstitutionality in that very case. Even in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) the question was not whether the decision in that very case should be applied retroactively to the case itself. Rather, the question was whether the rule of law announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1968), should be applied retroactively to the *Chevron Oil* litigants. The actual parties in *Rodrigue* did get the benefit of their actions inasmuch as the decision

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[8] *E.g., Ash v. Board of Education of the Woodhaven School District*, 699 F.2d 822, 827 (6th Cir. 1983); *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980); *Roberts v. Berry*, 541 F.2d 607, 610 (6th Cir. 1976); *Compton v. Tennessee Department of Public Welfare*, 532 F.2d 561, 563 n. 1 (6th Cir. 1976); *Finsky v. Union Carbide & Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957).

was reversed and remanded for further proceedings consistent with the opinion.

Bendix obviously hopes that by admitting that it first became aware of the retroactivity issue due to the New Jersey Supreme Court's decision in *Coons v. American Honda Motor Co.* ("Coons II"), 96 N.J. 419, 476 A.2d 763 (1984), it can avoid the effects of its actions. However, retroactivity is not a new or unique issue which first came into existence as a result of the *Coons II* decision. The retroactivity issue existed long before *Coons II* as evidenced by the fact that, unlike the present case, it was raised from the inception in the *Coons* litigation. The same issue arose in *Thompson v. Commissioner of Internal Revenue, supra*, cited by the Court of Appeals. In *Thompson*, 631 F.2d at 649, appellants in their reply brief raised the issue of collateral estoppel through the citation of two cases which were decided after the opening brief was filed. The court rejected appellants' argument:

> Even though *Parklane* and *Starker* were intervening cases, the doctrine of collateral estoppel itself is hardly new. The general rule is that appellants cannot raise a new issue for the first time in their reply briefs. (Citations omitted)

Just as in *Thompson*, the issue of retroactivity is not a new issue which owes its existence to the *Coons II* decision. Having raised the issue for the first time in its reply brief, Bendix is precluded from pursuing it.

There is also a chilling effect which the prospective application of the lower courts' decisions would have on the legal profession. Lawyers would be unwilling to take on such complex cases, and clients would be unwilling to

pay for their lawyers' work on them, if the parties responsible for affecting such a change in the law cannot benefit from their own efforts. It is the public good which would suffer from such an impact since it is ultimately the public which benefits from such constitutional challenges. The retroactivity of this decision goes to the very core of the integrity of the judicial process and the failure to so apply it can only undermine that process. Justice, equity and fairness demand that the holding of unconstitutionality be applied retroactively at the very least to Midwesco. Retroactive application is also the sole means of preventing Midwesco from suffering further constitutional deprivation. The prospective application of the opinion herein would merely recognize the very unconstitutionality which the lower courts have sought to abrogate.

While it is true that in *Coons II* the New Jersey Supreme Court applied its decision in *Coons I* prospectively, it was a 4 to 3 split decision which factually can be easily distinguished from the case at bar. It must first be noted that *Coons II* was decided under New Jersey state law and not under federal retroactivity law. In fact, the court in *Coons II* acknowledged that retrospectivity is the traditional rule and that "ordinarily the fruits of the struggle are awarded the successful litigant." *Coons II*, 476 A.2d at 772. The court in *Coons II* was also swayed by the belief that its decision did not result in any injustice to Honda since it was an "institutional litigant" composing a class that in the future would frequently have resorted to the statute of limitations. *Id.* Additionally, as set forth below, the case history of the tolling statute in Ohio is quite different from that of New Jersey.

As previously stated, the *Chevron Oil* test is inappropriate because it involved the retroactive effect of a separate decision rather than the application of a finding of unconstitutionality in the very case before the court. See, *e.g., Shannon v. United States Civil Service Commission*, 444 F.Supp. 354, 369 (N.D.Ca., 1977), *modified on other grounds*, 621 F.2d 1030 (9th Cir. 1980). Were the court, however, to apply the *Chevron Oil* test its attention must be directed to the fact that Bendix fails to establish, as it must since prospective application is exceptional, that it has met all three parts of the test. *Cochran v. Birkel*, 651 F.2d 1219, 1223 n. 8 (6th Cir. 1981).

As *Chevron Oil* recognizes, the general rule is one of the retroactiove application of such decisions. The first factor under *Chevron Oil* to be met in order to establish nonretroactivity is that the decision in question must establish a new principle of law either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. As Bendix concedes, the lower courts' decisions did not overrule clear past precedent on which it may have relied. The case history of the tolling statute did foreshadow the lower courts' holdings and illustrates that the decisions did not represent a "clean break" with the past. The courts in *Title Guaranty and Surety Company v. McAllister*, 180 Ohio St. 537, 200 N.E. 831 (1936) and *Thompson v. Horvath*, 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967), both held that the tolling statute did not toll the statute of limitations for a cause of action against a foreign corporation which was amenable to service of process. Both of these cases were approvingly cited as

recently as 1971 by the Court of Appeals in *Partis v. Miller Equipment Co.*, 439 F.2d 262 (6th Cir. 1971), which similarly held that the tolling statute did not apply to toll the statute of limitations as to a foreign corporation which was amenable to service of process.

The court in *Seeley v. Expert, Inc. supra,* held that the tolling statute applied to a non-resident owner or operator of a motor vehicle. The court in *Seeley* did not overrule or reject its prior decisions in *McAllister* and *Thompson* and in fact specifically distinguished those cases as not involving a non-resident motorist or owner of a motor vehicle. Despite this, the court in *Ohio Brass v. Allied Products Corp.*, 339 F.Supp. 417 (N.D.Ohio 1972), refused to follow the *McAllister-Thompson* line of cases based upon its conclusion that *Seeley*, affected a change in Ohio law. Subsequent to *Ohio Brass*, however, the court in *Hayden v. Ford Motor Co.*, 364 F.Supp. 398 (N.D.Ohio 1973), held that *Partis* was still the controlling law on the question of the application of the tolling statute to a non-resident corporation which was amenable to service of process. Thus, Ohio case law clearly foreshadowed a finding that the tolling statute would not apply to foreign corporations which were amenable to service of process.

The second factor of the *Chevron Oil* test is whether the retrospective operation of the decision will further or retard the operation of the new rule of law. The prospective application of the decisions herein as sought by Bendix mocks the decision itself inasmuch as the lower courts' decisions struck the tolling statute as unconstitutional. The prospective application would give credence to that which the courts have already found to be unconstitutional.

This further evidences the inapplicability of the *Chevron Oil* test to this case.

The third factor of the test is whether retroactive application could produce substantial inequitable results. Quite to the contrary, as already established, it is the prospective application which undoubtedly would cause inequitable results. Bendix fails to delineate any inequitable results arising from retroactive application. There is not even a scintilla of evidence anywhere in the record evidencing Bendix's reliance on the tolling statute. The reason for this is that Bendix raised this argument for the first time in its reply brief before the Court of Appeals.

Midwesco does not believe that the Court should even consider the issue of retroactivity or, if it does, that the *Chevron Oil* test is the appropriate standard to be applied. However, even in the event that the court were to apply the *Chevron Oil* test, it is clear that Bendix cannot comport with the three factors and thus the holding of unconstitutionality must be applied retroactively.

Bendix, citing simply two cases, makes the overly broad and incorrect statement that decisions serving to shorten a limitations period are in most instances singularly inappropriate for retroactive application. Neither of the cases cited by Bendix involve a statute being declared unconstitutional as in the present cause. Both cases simply concern a change in the relevant limitations period brought about by decisions in other cases. Here, there was a finding in this very case that the tolling statute was unconstitutional.

Moreover, Bendix's statement is simply untrue. Courts routinely apply decisions retroactively even where they

serve to shorten the limitations period for the filing of suit. See, *e.g., Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985) (involving the same statute, 42 U.S.C. § 1983, and the same case as in *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), cited by Bendix); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3d Cir. 1985); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581 (3d Cir. 1983).

There is no justification for anything other than the retroactive application of the lower courts' decisions holding the tolling statute unconstitutional.

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CONCLUSION

For the aforesaid reasons, the lower courts correctly held that the Ohio tolling statute is unconstitutional as applied to Midwesco, for violating the Commerce Clause. This Court should affirm the lower courts' decisions granting Midwesco's motion for summary judgment and dismissing Bendix's claims against Midwesco.

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APPENDIX

OHIO REV. CODE § 1703.041

(A) Every foreign corporation for profit that is licensed to transact business in this state, and every foreign nonprofit corporation that is licensed to exercise its corporate privileges in this state, shall have and maintain an agent, sometimes referred to as the "designated agent," upon whom process against such corporation may be served within this state. The agent may be a natural person who is a resident of this state, or may be a domestic corporation for profit or a foreign corporation for profit holding a license as such under the laws of this state which is authorized by its articles of incorporation to act as such agent, and which has a business address in this state.

OHIO REV. CODE § 1703.02

Sections 1703.01 to 1703.31, inclusive, of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce, by engineers, or by employees especially experienced as to such machinery or equipment, as part thereof; to banks, trust companies, building and loan associations, title guarantee and trust companies, bond investment companies, and insurance companies; or to public utility companies engaged in this state in interstate commerce.

OHIO CIVIL RULE 4.2(6)

Service of process, except service by publication as provided in Rule 4.4(A), pursuant to Rule 4 through Rule 4.6 shall be made as follows:

(6) Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation.

N.J.S.A. 2A:14-22

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods

of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

N.J.S.A. 14A:4-1

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of 21 years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this act.

(4) The designation of a principal or registered office in this State and of a registered agent in charge thereof by any corporation of this State or by any foreign corporation authorized to transact business in this State, as in force on the effective date of this act, shall continue

with like effect as if made hereunder until changed pursuant to this act.

NEW JERSEY RULE 4:4-4(c)(1)

Service of summons, writs and complaints shall be made as follows:

(c)(1)Upon a domestic or foreign corporation by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

FORMER IDAHO CODE § 30-509

Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.
